NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_f4r8

# CALIFORNIA REPORTER

COVERING CASES REPORTED IN

## PACIFIC REPORTER
SECOND SERIES




99 P.2d – 100 P.2d

---

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1940, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 99, Nos. 1-4;
Vol. 100, Nos. 1-4.

---

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.99-100 P.2d
5th Reprint—1974

# CASES REPORTED


| | Vol. | | Page |
|---|---|---|---|
| Adams v. Boyce, App. | 99 | P.2d | 1044 |
| Adams; Metropolitan Water Dist. of Southern California v., App. | 99 | P.2d | 659 |
| Adams; Metropolitan Water Dist. of Southern California v., App. | 99 | P.2d | 675 |
| Adams; Metropolitan Water Dist. of Southern California v., App. | 100 | P.2d | 357 |
| Adams; San Bernardino County Sav. Bank v., App. | 99 | P.2d | 697 |
| Advance Auto Body Works; Davis Welding & Manufacturing Co. v., App. | 100 | P.2d | 1067 |
| Ahlborn v. Peters, App. | 100 | P.2d | 542 |
| Ahlborn v. Peters, App. | 100 | P.2d | 1085 |
| Alberts' Estate, In re, App. | 100 | P.2d | 538 |
| Anderson; People v., App. | 100 | P.2d | 348 |
| Andre v. Stilson, App. | 99 | P.2d | 557 |
| Andrews v. California Trust Co., Sup. | 100 | P.2d | 1055 |
| Anthony; General v., App. | 100 | P.2d | 1087 |
| Armour; Maurer v., App. | 100 | P.2d | 813 |
| Arnold's Estate, In re, App. | 99 | P.2d | 376 |
| Associated Almond Growers of Paso Robles; Konig v., App. | 99 | P.2d | 678 |
| Axelrod v. Board of Education of City and County of San Francisco, App. | 99 | P.2d | 571 |
| Azusa Valley Sav. Bank; Peake v., App. | 99 | P.2d | 382 |
| Baber; Clough v., App. | 100 | P.2d | 519 |
| Baggiani; Lenihan v., App. | 99 | P.2d | 577 |
| Banat; People v., Super. | 100 | P.2d | 374 |
| Bank of America Nat. Trust & Savings Ass'n v. McLaughlin, App. | 99 | P.2d | 548 |
| Bank of America Nat. Trust & Savings Ass'n v. West End Chemical Co., App. | 100 | P.2d | 318 |
| Bank of California Nat. Ass'n v. Superior Court in and for City and County of San Francisco, App. | 100 | P.2d | 1110 |
| Bard v. Kent, App. | 99 | P.2d | 308 |
| Barnett v. La Mesa Post No. 282, American Legion Department of California, Sup. | 99 | P.2d | 650 |
| Bauer v. Bauer, App. | 100 | P.2d | 1070 |
| Bauman; Stroh v., App. | 99 | P.2d | 337 |
| Baxter's Estate, In re, Sup. | 99 | P.2d | 276 |
| B. B. McGinnis Co.; John v., App. | 99 | P.2d | 323 |
| Beam v. Dugan, App. | 99 | P.2d | 694 |
| Bell, Ex parte, App. | 100 | P.2d | 339 |
| Bender v. Perry, App. | 99 | P.2d | 319 |
| Berkowitz v. Kiener Co., App. | 99 | P.2d | 578 |
| Berkowitz v. Palm Springs La Quinta Development Co., App. | 99 | P.2d | 372 |
| Bigelow v. City of Ontario, App. | 99 | P.2d | 298 |
| Bigman; People v., Super. | 100 | P.2d | 370 |
| Bigsby v. Johnson, Sup. | 99 | P.2d | 268 |
| Blaine; Hollingsworth v., App. | 99 | P.2d | 599 |
| Board of Education of City and County of San Francisco; Axelrod v., App. | 99 | P.2d | 571 |
| Board of Education of City and County of San Francisco; Learned v., App. | 99 | P.2d | 1100 |
| Board of Education of City and County of San Francisco; Mahoney v., App. | 99 | P.2d | 1100 |
| Board of Pension Com'rs of City of Los Angeles; Dillon v., App. | 100 | P.2d | 803 |
| Board of Trustees of Leland Stanford Jr. University; Martin v., App. | 99 | P.2d | 684 |

| | Vol. | | Page |
|---|---|---|---|
| Bourdieu v. Seaboard Oil Corporation of Delaware, App. | 100 | P.2d | 528 |
| Bower; Studebaker v., App. | 100 | P.2d | 492 |
| Boyce; Adams v., App. | 99 | P.2d | 1044 |
| Brown; Robertson v., App. | 99 | P.2d | 288 |
| Bujulian v. Consolidated Irr. Dist., App. | 99 | P.2d | 348 |
| Buley v. Murdoff, App. | 100 | P.2d | 786 |
| Burns; Davidson v., App. | 100 | P.2d | 1105 |
| Butterfield; People v., App. | 99 | P.2d | 310 |
| Buttram v. Finley, App. | 99 | P.2d | 1093 |
| California Trust Co.; Andrews v., Sup. | 100 | P.2d | 1055 |
| Callahan; Payne v., App. | 99 | P.2d | 1050 |
| Campbell; Funk v., Sup. | 100 | P.2d | 762 |
| Castro; People v., App. | 99 | P.2d | 374 |
| Cathey v. City and County of San Francisco, App. | 99 | P.2d | 1109 |
| Chichester v. Commercial Credit Co., two cases, App. | 99 | P.2d | 1083 |
| Choynski; Liebman v., App. | 99 | P.2d | 1119 |
| City and County of San Francisco; Cathey v., App. | 99 | P.2d | 1109 |
| City of Los Angeles; Washington Blvd. Beach Co. v., App. | 100 | P.2d | 828 |
| City of Los Banos; Sischo v., App. | 100 | P.2d | 305 |
| City of Monrovia; Ward v., App. | 100 | P.2d | 836 |
| City of Ontario; Bigelow v., App. | 99 | P.2d | 298 |
| City of Santa Maria; Soares v., App. | 100 | P.2d | 1108 |
| Clark; Cowell v., App. | 99 | P.2d | 594 |
| Clark; Stephens v., App. | 99 | P.2d | 316 |
| Clough v. Baber, App. | 100 | P.2d | 519 |
| Cobb; Stein v., App. | 100 | P.2d | 358 |
| Coburn, Inc., v. Tiffany Productions, App. | 89 | P.2d | 569 |
| Commercial Credit Co.; Chichester v., App. | 99 | P.2d | 1083 |
| Commercial Discount Co. v. Los Angeles County, App. | 100 | P.2d | 309 |
| Connor, In re, Sup. | 99 | P.2d | 248 |
| Consolidated Irr. Dist.; Bujulian v., App. | 99 | P.2d | 348 |
| Corby; Swanton v., App. | 100 | P.2d | 1077 |
| Cowan; People v., App. | 100 | P.2d | 1079 |
| Cowell v. Clark, App. | 99 | P.2d | 594 |
| Craemer v. Drake, Sup. | 99 | P.2d | 261 |
| Craemer v. Holmes, Sup. | 99 | P.2d | 261 |
| Craig; Los Angeles County v., App. | 100 | P.2d | 818 |
| Cramer; Young v., App. | 100 | P.2d | 523 |
| Custodians of Telluride Ass'n; Drapeau v., Sup. | 99 | P.2d | 251 |
| Cvecich v. Giardino, App. | 99 | P.2d | 573 |
| Dandini v. Superior Court in and for Alameda County, App. | 100 | P.2d | 535 |
| Dando v. Dando, App. | 99 | P.2d | 561 |
| Davidson v. Burns, App. | 100 | P.2d | 1105 |
| Davis v. Morris, App. | 99 | P.2d | 345 |
| Davis Welding & Manufacturing Co. v. Advance Auto Body Works, App. | 100 | P.2d | 1067 |
| Dempsey Realty Co. v. Oxford Apartments Corporation, App. | 100 | P.2d | 793 |
| Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., App. | 100 | P.2d | 822 |
| Dillon v. Board of Pension Com'rs of City of Los Angeles, App. | 100 | P.2d | 803 |
| Dobkin; Kleinberg v., App. | 100 | P.2d | 1091 |
| Dobkin's Estate, In re, App. | 100 | P.2d | 1091 |
| Dolan; People v., App. | 100 | P.2d | 791 |
| Drake; Craemer v., Sup. | 99 | P.2d | 261 |
| Drapeau v. Custodians of Telluride Ass'n, Sup. | 99 | P.2d | 251 |
| Dugan; Beam v., App. | 99 | P.2d | 694 |
| Dunlavy v. Nead, Sup. | 99 | P.2d | 1044 |
| Dunn v. Shamoon, App. | 99 | P.2d | 1113 |
| Dunnell v. Shelley, App. | 100 | P.2d | 830 |

| | Vol. | | Page |
|---|---|---|---|
| Eaton v. San Diego Tuberculosis Ass'n & Rest Haven Preventorium, App. | 100 | P.2d | 547 |
| Eaton's Estate, In re, App. | 100 | P.2d | 813 |
| Elliott v. McCombs, App. | 100 | P.2d | 499 |
| Ellis; Sesma v., App. | 100 | P.2d | 816 |
| Employers' Liability Assur. Corporation v. Industrial Accident Commission, App. | 99 | P.2d | 1089 |
| Farish v. Pacific Indemnity Co., App. | 100 | P.2d | 775 |
| Farmers & Merchants Nat. Bank of Los Angeles v. Reed, Sup. | 100 | P.2d | 1045 |
| Fay Securities Co. v. Mortgage Guarantee Co., App. | 100 | P.2d | 344 |
| Fernandez v. Security First Nat. Bank of Los Angeles, App. | 99 | P.2d | 1102 |
| Fidelity & Casualty Co. of New York v. Fireman's Fund Indemnity Co., App. | 100 | P.2d | 364 |
| Finley; Buttram v., App. | 99 | P.2d | 1093 |
| Fireman's Fund Indemnity Co.; Fidelity & Casualty Co. of New York v., App. | 100 | P.2d | 364 |
| Flenaugh; People v., App. | 99 | P.2d | 323 |
| Fletcher Oil Co.; Lohn v., App. | 100 | P.2d | 505 |
| Flores; People v., App. | 99 | P.2d | 326 |
| Freeman; Ray v., App. | 100 | P.2d | 332 |
| Funk v. Campbell, Sup. | 100 | P.2d | 762 |
| Furer; Hollywood Motion Picture Equipment Co. v., App. | 99 | P.2d | 1073 |
| Gaines' Estate, In re, Sup. | 100 | P.2d | 1055 |
| Gallinger; People v., App. | 99 | P.2d | 597 |
| Gavin; Manning v., App. | 100 | P.2d | 350 |
| Gay; People v., App. | 99 | P.2d | 371 |
| Gaytan; People v., App. | 100 | P.2d | 496 |
| General v. Anthony, App. | 100 | P.2d | 1087 |
| General Electric Co.; Gutelius v., App. | 99 | P.2d | 682 |
| Giardino; Cvecich v., App. | 99 | P.2d | 573 |
| Gibson; Pease v., App. | 99 | P.2d | 353 |
| Gillen v. Municipal Court of City and County of San Francisco, App. | 99 | P.2d | 555 |
| Gilpin; People v., App. | 100 | P.2d | 356 |
| Glickman v. New York Life Ins. Co., App. | 100 | P.2d | 1100 |
| Goldstein; People v., App. | 99 | P.2d | 1069 |
| Gould & Kane v. Valterza, App. | 100 | P.2d | 335 |
| Graham-Loftus Oil Corporation v. Mountain View Development Corporation, App. | 99 | P.2d | 357 |
| Grimes; Landis v., App. | 100 | P.2d | 1089 |
| Guldstrand v. Johnson, Carvell & Murphy, App. | 99 | P.2d | 1065 |
| Gutelius v. General Electric Co., App. | 99 | P.2d | 682 |
| Guy Coburn, Inc., v. Tiffany Productions, App. | 99 | P.2d | 569 |
| Hall v. Kaufman, App. | 99 | P.2d | 339 |
| Hansen's Estate, In re, App. | 100 | P.2d | 776 |
| Hanson v. Mead-Haskell Co., Super. | 100 | P.2d | 1117 |
| Hays v. Superior Court in and for Los Angeles County, Sup. | 100 | P.2d | 1050 |
| Heard; McDonald v., App. | 99 | P.2d | 1115 |
| Hight; People v., App. | 99 | P.2d | 657 |
| Hill v. Superior Court in and for Alameda County, App. | 100 | P.2d | 526 |
| Hinshaw v. Hopkins, App. | 99 | P.2d | 283 |
| Hollingsworth v. Blaine, App. | 99 | P.2d | 599 |
| Hollingsworth's Estate, In re, App. | 99 | P.2d | 599 |
| Hollywood Motion Picture Equipment Co. v. Furer, App. | 99 | P.2d | 1073 |
| Holmes; Craemer v., Sup. | 99 | P.2d | 261 |
| Holmes; Metropolitan Water Dist. of Southern California v., App. | 99 | P.2d | 659 |
| Holmes; Metropolitan Water Dist. of Southern California v., App. | 100 | P.2d | 357 |
| Hopkins; Hinshaw v., App. | 99 | P.2d | 283 |
| Industrial Accident Commission; Employers' Liability Assur. Corporation v., App. | 99 | P.2d | 1089 |

| | Vol. | | Page |
|---|---|---|---|
| Industrial Accident Commission; Taylor v., App. | 100 | P.2d | 511 |
| Industrial Accident Commission; Young v., App. | 100 | P.2d | 1062 |
| I. N. Parlier Estate Co.; Lawrence v., Sup. | 100 | P.2d | 765 |
| Inyo Chemical Co.; Department of Water and Power of City of Los Angeles v., App. | 100 | P.2d | 822 |
| Inyo Chemical Co.; Young v., App. | 100 | P.2d | 822 |
| Isenberg v. Superior Court of Los Angeles County, App. | 99 | P.2d | 369 |
| Jackson v. Lacy, App. | 100 | P.2d | 313 |
| John v. B. B. McGinnis Co., App. | 99 | P.2d | 323 |
| Johnson; Bigsby v., Sup. | 99 | P.2d | 268 |
| Johnson; Kamp v., Sup. | 99 | P.2d | 274 |
| Johnson; Kirk v., App. | 99 | P.2d | 279 |
| Johnson; Morris Plan Co. of San Francisco v., App. | 100 | P.2d | 493 |
| Johnson; Spinner v., App. | 100 | P.2d | 538 |
| Johnson v. Western Air Exp. Corporation, two cases, App. | 100 | P.2d | 517 |
| Johnson, Carvell & Murphy; Guldstrand v., App. | 99 | P.2d | 1065 |
| Johnston; People v., App. | 100 | P.2d | 307 |
| Joughin; See v., Sup. | 99 | P.2d | 264 |
| Junge v. Midland Counties Public Service Corporation, two cases, App. | 100 | P.2d | 1073 |
| Kamp v. Johnson, Sup. | 99 | P.2d | 274 |
| Kaufman; Hall v., App. | 99 | P.2d | 339 |
| Keet's Estate, In re, Sup. | 100 | P.2d | 1045 |
| Kent; Bard v., App. | 99 | P.2d | 308 |
| Kieberk Corporation; Palm Springs-La Quinta Development Co. v., App. | 100 | P.2d | 346 |
| Kiener Co.; Berkowitz v., App. | 99 | P.2d | 578 |
| Kirby; People v., Super. | 99 | P.2d | 603 |
| Kirk v. Johnson, App. | 99 | P.2d | 279 |
| Kleinberg v. Dobkin, App. | 100 | P.2d | 1091 |
| Klopstock v. Superior Court in and for City and County of San Francisco, App. | 99 | P.2d | 302 |
| Koch; State v., App. | 99 | P.2d | 349 |
| Konig v. Associated Almond Growers of Paso Robles, App. | 99 | P.2d | 678 |
| Knapp v. Knapp, Sup. | 100 | P.2d | 759 |
| Kyne v. Kyne, App. | 100 | P.2d | 806 |
| Lacy; Jackson v., App. | 100 | P.2d | 313 |
| La Mesa Post No. 282, American Legion Department of California; Barnett v., Sup. | 99 | P.2d | 650 |
| Lampman; Pitcher v., Sup. | 100 | P.2d | 488 |
| Lampman's Estate, In re, Sup. | 100 | P.2d | 488 |
| Landis v. Grimes, App. | 100 | P.2d | 1089 |
| Lathrop; People v., App. | 99 | P.2d | 330 |
| Lawrence v. I. N. Parlier Estate Co., Sup. | 100 | P.2d | 765 |
| Lazar, Ex parte, App. | 99 | P.2d | 342 |
| Learned v. Board of Education of City and County of San Francisco, App. | 99 | P.2d | 1100 |
| Lee v. Nanny, App. | 100 | P.2d | 832 |
| Lenahan; People v., App. | 100 | P.2d | 515 |
| Lenihan v. Baggiani, App. | 99 | P.2d | 577 |
| Liebman v. Choynski, App. | 99 | P.2d | 1119 |
| Logan; Peterson v., App. | 99 | P.2d | 376 |
| Lohn v. Fletcher Oil Co., App. | 100 | P.2d | 505 |
| Los Angeles County; Commercial Discount Co. v., App. | 100 | P.2d | 309 |
| Los Angeles County v. Craig, App. | 100 | P.2d | 818 |
| Los Angeles County; Parsons v., App. | 99 | P.2d | 1079 |
| Lovejoy's Estate, In re, App. | 100 | P.2d | 547 |
| Lucas; People v., App. | 99 | P.2d | 547 |
| McCombs; Elliott v., App. | 100 | P.2d | 499 |
| McDonald v. Heard, App. | 99 | P.2d | 1115 |

| | Vol. | | Page |
|---|---|---|---|
| McDonald's Estate, In re, App. | 99 | P.2d | 1115 |
| Machado v. Title Guarantee & Trust Co., Sup. | 99 | P.2d | 245 |
| McLaughlin; Bank of America Nat. Trust & Savings Ass'n v., App. | 99 | P.2d | 548 |
| McVicker; People v., App. | 99 | P.2d | 1110 |
| Mahoney v. Board of Education of City and County of San Francisco, App. | 99 | P.2d | 1100 |
| Manning v. Gavin, App. | 100 | P.2d | 350 |
| Markham; O'Brien v., App. | 99 | P.2d | 583 |
| Martin v. Board of Trustees of Leland Stanford Jr. University, App. | 99 | P.2d | 684 |
| Mashbir v. Mashbir, App. | 99 | P.2d | 562 |
| Mason; People v., App. | 99 | P.2d | 567 |
| Maurer v. Armour, App. | 100 | P.2d | 813 |
| Mead-Haskell Co.; Hanson v., Super. | 100 | P.2d | 1117 |
| Metropolitan Water Dist. of Southern California v. Adams, App. | 99 | P.2d | 659 |
| Metropolitan Water Dist. of Southern California v. Adams, App. | 99 | P.2d | 675 |
| Metropolitan Water Dist. of Southern California v. Adams, App. | 100 | P.2d | 357 |
| Metropolitan Water Dist. of Southern California v. Holmes, App. | 99 | P.2d | 659 |
| Metropolitan Water Dist. of Southern California v. Holmes, App. | 100 | P.2d | 357 |
| Metson; Pine Grove Consol. Mines v., App. | 100 | P.2d | 794 |
| Meyer v. Thomas, App. | 100 | P.2d | 360 |
| Meyer v. Thomas, App. | 100 | P.2d | 1066 |
| Mickelson v. Mickelson, App. | 99 | P.2d | 687 |
| Mickelson's Estate, In re, App. | 99 | P.2d | 687 |
| Midland Counties Public Service Corporation; Junge v., App. | 100 | P.2d | 1073 |
| Miles; People v., App. | 99 | P.2d | 551 |
| Mizer; People v., App. | 99 | P.2d | 333 |
| Moran v. Superior Court in and for Sacramento County, App. | 100 | P.2d | 1096 |
| Morris; Davis v., App. | 99 | P.2d | 345 |
| Morris' Estate, In re, App. | 99 | P.2d | 294 |
| Morris Plan Co. of San Francisco v. Johnson, App. | 100 | P.2d | 493 |
| Mortgage Guarantee Co.; Fay Securities Co. v., App. | 100 | P.2d | 344 |
| Mountain View Development Corporation; Graham-Loftus Oil Corporation v., App. | 99 | P.2d | 357 |
| Municipal Court of City and County of San Francisco; Gillen v., App. | 99 | P.2d | 555 |
| Murdoff; Buley v., App. | 100 | P.2d | 786 |
| Nanny; Lee v., App. | 100 | P.2d | 832 |
| Nead; Dunlavy v., Sup. | 99 | P.2d | 1044 |
| Newman; People v., App. | 99 | P.2d | 1067 |
| New York Life Ins. Co.; Glickman v., App. | 100 | P.2d | 1100 |
| Niemann; Sanderson v., App. | 100 | P.2d | 508 |
| North American Bond & Mortgage Co.; Pacific States Savings & Loan Co. v., App. | 99 | P.2d | 355 |
| Northcutt; People v., App. | 100 | P.2d | 1094 |
| O'Brien v. Markham, App. | 99 | P.2d | 583 |
| O'Brien; People v., App. | 100 | P.2d | 367 |
| Oxford Apartments Corporation; Dempsey Realty Co. v., App. | 100 | P.2d | 793 |
| Pacific Coast Building-Loan Ass'n of Los Angeles, In re, Sup. | 99 | P.2d | 251 |
| Pacific Coast Building-Loan Ass'n of Los Angeles, In re, two cases, Sup. | 99 | P.2d | 261 |
| Pacific Indemnity Co.; Farish v., App. | 100 | P.2d | 775 |
| Pacific States Savings & Loan Co. v. North American Bond & Mortgage Co., App. | 99 | P.2d | 355 |
| Pacific States Savings & Loan Co. v. Painter, App. | 99 | P.2d | 1103 |
| Padilla v. Padilla, App. | 100 | P.2d | 1093 |
| Painter; Pacific States Savings & Loan Co. v., App. | 99 | P.2d | 1103 |
| Palm Springs La Quinta Development Co.; Berkowitz v., App. | 99 | P.2d | 372 |
| Palm Springs-La Quinta Development Co. v. Kieberk Corporation, App. | 100 | P.2d | 346 |
| Parsons v. Los Angeles County, App. | 99 | P.2d | 1079 |
| Paton v. Superior Court in and for Contra Costa County, App. | 99 | P.2d | 698 |

| | Vol. | | Page |
|---|---|---|---|
| Paton v. Tecter, App. | 99 | P.2d | 699 |
| Payne v. Callahan, App. | 99 | P.2d | 1050 |
| Peake v. Azusa Valley Sav. Bank, App. | 99 | P.2d | 382 |
| Pease v. Gibson, App. | 99 | P.2d | 353 |
| People v. Anderson, App. | 100 | P.2d | 348 |
| People v. Banat, Super. | 100 | P.2d | 374 |
| People v. Bigman, Super. | 100 | P.2d | 370 |
| People v. Butterfield, App. | 99 | P.2d | 310 |
| People v. Castro, App. | 99 | P.2d | 374 |
| People v. Cowan, App. | 100 | P.2d | 1079 |
| People v. Dolan, App. | 100 | P.2d | 791 |
| People v. Flenaugh, App. | 99 | P.2d | 323 |
| People v. Flores, App. | 99 | P.2d | 326 |
| People v. Gallinger, App. | 99 | P.2d | 597 |
| People v. Gay, App. | 99 | P.2d | 371 |
| People v. Gaytan, App. | 100 | P.2d | 496 |
| People v. Gilpin, App. | 100 | P.2d | 356 |
| People v. Goldstein, App. | 99 | P.2d | 1069 |
| People v. Hight, App. | 99 | P.2d | 657 |
| People v. Johnston, App. | 100 | P.2d | 307 |
| People v. Kirby, Super. | 99 | P.2d | 603 |
| People v. Lathrop, App. | 99 | P.2d | 330 |
| People v. Lenahan, App. | 100 | P.2d | 515 |
| People v. Lucas, App. | 99 | P.2d | 547 |
| People v. McVicker, App. | 99 | P.2d | 1110 |
| People v. Mason, App. | 99 | P.2d | 567 |
| People v. Miles, App. | 99 | P.2d | 551 |
| People v. Mizer, App. | 99 | P.2d | 333 |
| People v. Newman, App. | 99 | P.2d | 1067 |
| People v. Northcutt, App. | 100 | P.2d | 1094 |
| People v. O'Brien, App. | 100 | P.2d | 367 |
| People v. Reifenstuhl, App. | 99 | P.2d | 564 |
| People v. Richardson, App. | 99 | P.2d | 366 |
| People v. Rodriguez, App. | 99 | P.2d | 363 |
| People v. Stanford, App. | 100 | P.2d | 796 |
| People v. Stanhope, App. | 99 | P.2d | 1075 |
| People v. Stuhlmiller, App. | 99 | P.2d | 1072 |
| People v. Thomas, App. | 99 | P.2d | 294 |
| People v. Von Benson, App. | 99 | P.2d | 295 |
| People v. Wahl, Super. | 100 | P.2d | 550 |
| People v. Warren, App. | 99 | P.2d | 1058 |
| Perry; Bender v., App. | 99 | P.2d | 319 |
| Peters; Ahlborn v., App. | 100 | P.2d | 542 |
| Peters; Ahlborn v., App. | 100 | P.2d | 1085 |
| Peterson v. Logan, App. | 99 | P.2d | 376 |
| Pine Grove Consol. Mines v. Metson, App. | 100 | P.2d | 794 |
| Pitcher v. Lampman, Sup. | 100 | P.2d | 488 |
| Plymouth Elementary School Dist.; Wicklund v., App. | 99 | P.2d | 314 |
| Porter v. Van Denburgh, Sup. | 99 | P.2d | 265 |
| Ray v. Freeman, App. | 100 | P.2d | 332 |
| Raymond's Estate, In re, App. | 100 | P.2d | 1085 |
| Reed; Farmers & Merchants Nat. Bank of Los Angeles v., Sup. | 100 | P.2d | 1045 |
| Reif v. Schumacker, App. | 99 | P.2d | 593 |
| Reifenstuhl; People v., App. | 99 | P.2d | 564 |
| Richardson; People v., App. | 99 | P.2d | 366 |
| Richardson v. Royal Indemnity Co., Sup. | 99 | P.2d | 276 |
| Robertson v. Brown, App. | 99 | P.2d | 288 |
| Rodriguez; People v., App. | 99 | P.2d | 363 |
| Royal Indemnity Co.; Richardson v., Sup. | 99 | P.2d | 276 |

| | Vol. | | Page |
|---|---|---|---|
| San Bernardino County Sav. Bank v. Adams, App. | 99 | P.2d | 697 |
| Sanderson v. Niemann, App. | 100 | P.2d | 508 |
| San Diego Tuberculosis Ass'n & Rest Haven Preventorium; Eaton v., App. | 100 | P.2d | 547 |
| Schumacker; Reif v., App. | 99 | P.2d | 593 |
| Seaboard Oil Corporation of Delaware; Bourdieu v., App. | 100 | P.2d | 528 |
| Security First Nat. Bank of Los Angeles; Fernandez v., App. | 99 | P.2d | 1102 |
| See v. Joughin, Sup. | 99 | P.2d | 264 |
| Sesma v. Ellis, App. | 100 | P.2d | 816 |
| Shamoon; Dunn v., App. | 99 | P.2d | 1113 |
| Shelley; Dunnell v., App. | 100 | P.2d | 830 |
| Sischo v. City of Los Banos, App. | 100 | P.2d | 305 |
| Soares v. City of Santa Maria, App. | 100 | P.2d | 1108 |
| Sontag v. Stringer, App. | 99 | P.2d | 1098 |
| Southern Pac. Co. v. Superior Court in and for Los Angeles County, Sup. | 100 | P.2d | 302 |
| Speik; Sutphin v., Sup. | 99 | P.2d | 652 |
| Speik v. Sutphin, Sup. | 99 | P.2d | 656 |
| Spinner v. Johnson, App. | 100 | P.2d | 538 |
| Stanford; People v., App. | 100 | P.2d | 796 |
| Stanhope; People v., App. | 99 | P.2d | 1075 |
| State v. Koch, App. | 99 | P.2d | 349 |
| Stein v. Cobb, App. | 100 | P.2d | 358 |
| Stephens v. Clark, App. | 99 | P.2d | 316 |
| Stilson; Andre v., App. | 99 | P.2d | 557 |
| Stringer; Sontag v., App. | 99 | P.2d | 1098 |
| Stroh v. Bauman, App. | 99 | P.2d | 337 |
| Studebaker v. Bower, App. | 100 | P.2d | 492 |
| Stuhlmiller; People v., App. | 99 | P.2d | 1072 |
| Superior Court in and for Alameda County; Dandini v., App. | 100 | P.2d | 535 |
| Superior Court in and for Alameda County; Hill v., App. | 100 | P.2d | 526 |
| Superior Court in and for City and County of San Francisco; Bank of California Nat. Ass'n v., App. | 100 | P.2d | 1110 |
| Superior Court in and for City and County of San Francisco; Klopstock v., App. | 99 | P.2d | 302 |
| Superior Court in and for Contra Costa County; Paton v., App. | 99 | P.2d | 698 |
| Superior Court in and for Los Angeles County; Hays v., Sup. | 100 | P.2d | 1050 |
| Superior Court in and for Los Angeles County; Southern Pac. Co. v., Sup. | 100 | P.2d | 302 |
| Superior Court in and for Los Angeles County; Vigne v., App. | 99 | P.2d | 589 |
| Superior Court in and for Sacramento County; Moran v., App. | 100 | P.2d | 1096 |
| Superior Court of Los Angeles County; Isenberg v., App. | 99 | P.2d | 369 |
| Sutphin; Speik v., Sup. | 99 | P.2d | 656 |
| Sutphin v. Speik, Sup. | 99 | P.2d | 652 |
| Swanton v. Corby, App. | 100 | P.2d | 1077 |
| Taylor v. Industrial Accident Commission, App. | 100 | P.2d | 511 |
| Teeter; Paton v., App. | 99 | P.2d | 699 |
| Thomas; Meyer v., App. | 100 | P.2d | 360 |
| Thomas; Meyer v., App. | 100 | P.2d | 1066 |
| Thomas; People v., App. | 99 | P.2d | 294 |
| Tiffany Productions; Guy Coburn, Inc., v., App. | 99 | P.2d | 569 |
| Title Guarantee & Trust Co.; Machado v., Sup. | 99 | P.2d | 245 |
| Todd v. Todd, App. | 99 | P.2d | 690 |
| Todd's Estate, In re, App. | 99 | P.2d | 690 |
| Valterza, Ex parte, App. | 100 | P.2d | 337 |
| Valterza; Gould & Kane v., App. | 100 | P.2d | 335 |
| Van Denburgh; Porter v., Sup. | 99 | P.2d | 265 |
| Vigne v. Superior Court in and for Los Angeles County, App. | 99 | P.2d | 589 |
| Von Benson; People v., App. | 99 | P.2d | 295 |

| | Vol. | | Page |
|---|---|---|---|
| Voss; Wine Packing Corporation of California v., App. | 100 | P.2d | 325 |
| Wahl; People v., Super. | 100 | P.2d | 550 |
| Wakefield v. Wakefield, App. | 99 | P.2d | 1105 |
| Ward v. City of Monrovia, App. | 100 | P.2d | 836 |
| Ward v. Ward, Sup. | 100 | P.2d | 773 |
| Warren; People v., App. | 99 | P.2d | 1058 |
| Washington Blvd. Beach Co. v. City of Los Angeles, App. | 100 | P.2d | 828 |
| West End Chemical Co.; Bank of America Nat. Trust & Savings Ass'n v., App. | 100 | P.2d | 318 |
| Western Air Exp. Corporation; Johnson v., App. | 100 | P.2d | 517 |
| White v. White, App. | 100 | P.2d | 789 |
| White v. White, App. | 100 | P.2d | 791 |
| Wicklund v. Plymouth Elementary School Dist., App. | 99 | P.2d | 314 |
| Williams' Estate, In re, App. | 99 | P.2d | 349 |
| Wine Packing Corporation of California v. Voss, App. | 100 | P.2d | 325 |
| Young v. Cramer, App. | 100 | P.2d | 523 |
| Young v. Industrial Accident Commission, App. | 100 | P.2d | 1062 |
| Young v. Inyo Chemical Co., App. | 100 | P.2d | 822 |




# CALIFORNIA REPORTER

IN VOLUME

99 PACIFIC REPORTER

SECOND SERIES

CAL.REP.99–100 P.2d—1

15 Cal.2d 180

## MACHADO et al. v. TITLE GUARANTEE & TRUST CO. et al.

L. A. 16188.

Supreme Court of California.

Feb. 14, 1940.

1. Boundaries ⇐33

The presumption that an owner of land bounded by a road or street owns to center of way is highly favored in the law. Civ. Code, §§ 831, 1112; Code Civ.Proc. § 2077, subd. 4.

2. Partition ⇐92

At common law, a referee in partition had no authority to lay out a public street but could only create and attach to one parcel of land a right of way or easement and impose such servitude on another parcel, where required for beneficial partition of property.

3. Partition ⇐92

The statute authorizing referees in partition, when for advantage of those interested, to set apart a portion of property for a way, road, or street which "shall not be assigned to any of the parties * * * but shall remain an open and public way, road or street * * *," is not intended to prevent complete partition of lands involved, but authorizes referees to create an easement for private or public way, instead of limiting their authority, as at common law, to creation of an easement in behalf of one parcel of land partitioned over another parcel so partitioned. Code Civ.Proc. § 764.

4. Boundaries ⇐33

Provision, in statute authorizing referee in partition to create an easement for private or public way, that portion set apart shall not be "assigned to any of the parties" applies to easement for public use and not to fee title, and hence such provision does not rebut presumption that owners of lands adjacent to a road or street, even though abandoned, own to the center thereof. Code Civ.Proc. §§ 764, 2077, subd. 4; Civ.Code, §§ 831, 1112.

5. Boundaries ⇐33

Description of parcels allotted in partition proceeding by referee in which strip of land was set apart for public way, but which was never accepted and finally abandoned, by metes and bounds, did not rebut presumption that owners of land contiguous to public way owned to center thereof. Code Civ. Proc. §§ 764, 765, 2077, subd. 4; Civ.Code, §§ 831, 1112.

6. Boundaries ⇐1

In construction of boundaries, the intention of parties is the controlling consideration.

7. Boundaries ⇐20(2)

Where in partition proceeding strip of land was set apart by referee for public way, which was never accepted and finally abandoned, those who were allotted parcels contiguous to abandoned public way were owners to the center thereof, in absence of any clear showing it was otherwise intended. Code Civ.Proc. §§ 764, 765, 2077, subd. 4; Civ.Code, §§ 831, 1112.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by Ricardo A. Machado and others against the Title Guarantee & Trust Company and others to quiet title to a strip of land which was set apart for a public way in a partition proceeding in 1876, but which was never accepted, used, or improved for such purpose, and was formally vacated and abandoned as a way by the board of supervisors in 1905. From judgment for defendants, the plaintiffs appeal.

Affirmed.

Willedd Andrews, Charles D. Munro, and Victor E. Wilson, all of Los Angeles, for appellants.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent Del Rey Co.

Keogh, Cate & Colver, of Los Angeles, for defendant and respondent Title Guarantee & Trust Co.

Keogh, Cate & Colver, Earl E. Johnson, and Arch H. Vernon, all of Los Angeles, for defendant and respondent Union Oil Co. of California.

SHENK, Justice.

This is a suit to quiet title to a strip of land which was set apart for a public way in a partition proceeding in 1876 but which was never accepted, used or improved for such purpose and was formally vacated and abandoned as a way by the board of supervisors in 1905. From a judgment for the defendants, the plaintiffs have prosecuted this appeal.

The facts stand undisputed and the parties differ only as to the legal conclusion to be deduced therefrom. It appears that the

strip of land in litigation, containing about 2.6 acres was originally a part of the Rancho La Ballona in Los Angeles county which was granted by the Mexican Government. Augustin Machado at the time of his death in 1865, owned an undivided one-fourth interest therein which he devised one-half to his wife, Ramona Machado, and one-half to his thirteen children in equal shares. In 1868 the entire rancho was partitioned and a certain portion was allotted to the Machado heirs (widow and children) in common. Thereafter and in 1875–76, at the suit of the widow, the portion of the rancho theretofore allotted to the Machado heirs in the earlier proceeding was partitioned and a certain tract of what was designated "fourth class land" was thereupon allotted by both metes and bounds and acreage to each of Ramona Machado, the widow, and to Jose de la Luz Machado, a son, and the strip of land here in dispute lying between the two tracts so allotted to the wife and son, respectively, was laid out and set apart as a road or street by the referee by metes and bounds corresponding with the boundaries of the two mentioned and adjacent tracts.

[1] Jose Machado, the son, conveyed his allotment or parcel of land in 1890 to Bernardino Machado by the same metes and bounds and acreage description as was employed when the same was allotted to him in the partition proceeding. Prior thereto and in 1879, Ramona Machado, the widow, had conveyed her allotment or parcel to one Briswalter in the same manner but, in addition, her deed contained an omnibus clause conveying all of her right, title and interest in and to Rancho La Ballona, of which her parcel and the strip here in controversy were at one time a part, excepting therefrom three specific tracts not material to the present inquiry. Both of these grantors are dead and the defendant title company and the defendant Del Rey Company by mesne conveyances have succeeded to the allotments or parcels partitioned to and thereafter conveyed by them. The defendant oil company claims a leasehold interest through its codefendants. As the successor in interest of the parcel allotted and partitioned to Jose Machado, the defendant Del Rey Company claims title to the north half of the abandoned street upon which said parcel fronts and the defendant title company, as successor in interest of the parcel allotted to Ramona Machado which is contiguous to the abandoned street on the south, claims title to the south half thereof. In respectively asserting title to one-half of the abandoned street, each of said two defendants relies on the presumption of law, declared in our code, that "An owner of land bounded by a road or street is presumed to own to the center of the way; but the contrary may be shown." Sec. 831, Civ.Code. Section 1112 of the same code states that "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." To the same effect is subdivision 4 of section 2077 of the Code of Civil Procedure. The decisions of this court giving expression and application to this principle are numerous. In Brown v. Bachelder, 214 Cal. 753, 755, 7 P.2d 1027, 1028; it is stated, "That the presumption is highly favored in the law is made clear by the discussion of this court in Anderson v. Citizen's S. & T. Co., 185 Cal. 386, 197 P. 113."

The plaintiffs are the heirs at law of both Augustin Machado (the original owner of the tract) and Ramona Machado (his widow and grantor through whom one of the defendants claims) while the plaintiff Marie Machado is the heir at law of Jose Machado (the son and grantor through whom the other defendant deraigns title). While recognizing the force and effect of the principle of law that owners of land contiguous to a street, such as the defendants herein, are presumed to own to the center thereof, the plaintiffs contend that the factual situation here is such as to rebut and destroy this presumption. They base their suit to quiet title to the abandoned street on the theory that the fee to the land embraced therein was not allotted to any of the parties in the 1876 partition proceeding, and hence remained in common with them as the heirs of Augustin Machado, the original owner, and that as such heirs they have not since conveyed the same to anyone. In support thereof they refer us to the 1874 amendment of section 764 of the Code of Civil Procedure which authorized referees in partition, when for the advantage of those interested, to set apart a portion of the property for a way, road or street which "shall not be assigned to any of the parties * * * but shall remain an open and public way, road or street * * *".

[2-4] At common law a referee in partition had no authority to lay out a public

street but could only create and attach to one parcel of land a right of way or easement and impose such servitude on another parcel where required for the beneficial partition of the property. 47 Cor.Jur. 500, sec. 571. This was the rule under section 764, supra, prior to its amendment in 1874. Myers v. Daubenbiss, 84 Cal. 1, 5, 23 P. 1027. Undoubtedly because of this lack of authority in the referee the code section was amended in the manner above indicated. To accord to this amendment the meaning advanced by the plaintiffs would result in this case, where the strip set apart was never accepted, used or improved as a street and was later formally abandoned as such, in a partition of a part only of the tract in question. This would be contrary to the express intention of the original owner, plaintiffs' ancestor, that the entire tract should go to his heirs in the shares designated by him and which intention obviously was sought to be given effect in the partition decree. In fact, the pleadings and orders, the report of the referee and the decree of the court confirming the report clearly indicate an intention to make a complete partition of the portion of the ranch theretofore allotted to the heirs of Augustin Machado. We are of the view that the code amendment was not intended to prevent the complete partition of the lands involved, elsewhere provided for in the code, but was to authorize referees in partition to create an easement for a private or a public way, instead of limiting their authority, as formerly, to the creation of an easement in behalf of one parcel of land partitioned over another parcel so partitioned. It goes without saying, that the former inability of a referee to create an easement for a private or public way must have rendered difficult the fair and equitable partition of large tracts of land so as to make all portions thereof accessible, and the code amendment must have been enacted to remedy this situation. The declaration in the code section, as amended, that the "portion so set apart" as a street shall not be "assigned to any of the parties" must here be held to apply to the easement for public use and not to the fee title and may well have reference to the settled proposition that no matter how clearly it may appear that an owner of a parcel of land holds fee title to the center of an adjoining street subject to the public easement, and that the boundary of his parcel is technically, therefore, the center of the street, he nevertheless has no right to the possession or occupancy of any portion thereof while used as a street. But where, as here, the strip set apart was never accepted, used or improved as a street and was thereafter formally abandoned as such, such right of possession and occupancy may not be denied to the contiguous owners. We therefore find nothing in the cited code section that in any way tends to overcome or rebut the presumption "highly favored in the law" that owners of lands adjacent to a road or street (even though abandoned) own to the center thereof. Anderson v. Citizens' Sav. & Trust Co., 185 Cal. 386, 197 P. 113.

[5] The plaintiff and appellants next refer us to the line of cases holding generally that while the presumption declared by the codes will in all proper cases be given effect, it is one which in many ways may be rebutted, and one of the specific ways in which it may be rebutted is by a description by metes and bounds. It will be recalled that the parcels allotted and partitioned to the widow and the son through whom the defendants respectively deraign title were described by metes and bounds. Without in any way detracting from the cases relied on by the appellants, we are of the view that the principle therein enunciated more properly has application to those situations where the description by metes and bounds is the result of the free exercise of choice by the grantor, and therefore evidences his intention to transfer only such of his property as is embraced within the metes and bounds description, and should not be applied to a case, such as this, wherein the method of description did not lie in the sole discretion of the referees or the court in the partition proceeding. The method of description employed by the latter was dictated by the provisions of section 765 of the Code of Civil Procedure, which, since its enactment in 1872, has declared that "The referees [in partition] must make a report of their proceedings * * * describing the property divided, and the shares allotted to each party, with a particular description of each share." In our opinion, the "particular" or metes and bounds descriptions employed from the partition of the tract in 1876 down to the defendants' acquisition of portions thereof by mesne conveyances were wholly the result of the statutory mandate that the allotted or partitioned parcels be given a "particular description" and therefore were not intended,

nor do they serve, to rebut the favored presumption that owners contiguous to a street or road own to the center thereof. Such descriptions may reasonably be said to have been employed to identify the parcels partitioned and transferred and not with the intention of excluding the abandoned street area.

[6] The findings and judgment of the court below and our conclusion herein give effect to the undoubted intention of the original owner, Augustin Machado, and of the court in the partition proceeding to the end that the entire tract should be partitioned among the former's heirs at law in the manner designated by him and thereafter effectively pass by mesne conveyances to their successors in interest. In the construction of boundaries, the intention of the parties is the controlling consideration. Miller v. Grunsky, 141 Cal. 441, 66 P. 858, 75 P. 48; 4 Cal.Jur. 373, sec. 2. Whenever possible, a court should place itself in the position of the parties and ascertain their intent, as in the case of any contract. As stated in Miller & Lux v. Secara, 193 Cal. 755, 227 P. 171, 173, "Intention, whether express or shown by surrounding circumstances, is all controlling * * *." The declaration in the code that an owner of land bounded by a road or street is presumed to own to the center thereof is based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to adjoining land. This reasoning finds expression in Brown v. Bachelder, 214 Cal. 753, 755, 756, 7 P.2d 1027, and would seem to be peculiarly pertinent to a case such as this where a group of fourteen people originally owned undivided interests in the small area here involved. Surely, it would seem to run counter to the intention of the parties to conclude that the unaccepted, unused, unimproved and later abandoned strip designated as a street in the partition proceeding in 1876 did not pass, one-half each, to the adjoining owners upon partition and from them by mesne conveyances to the respective defendants herein. Particularly when, in addition to other matters, the record discloses that there was not any defined or traveled road through this marsh land and that for many years there was, and still is, a line of fence posts "all along the center" of said strip with "wires on the posts".

[7] We conclude, therefore, that in the absence of any circumstances showing clearly that it was otherwise intended, the partition of the one-fourth interest originally owned by Augustin Machado among his heirs and devisees operated to convey as a part of the parcels allotted to his widow, Ramona Machado, and his son Jose Machado the fee to the center line of the contiguous unused, unaccepted, unimproved and later abandoned street, which fee passed by mesne conveyances to the grantee defendants as above indicated.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; CARTER, J.; GIBSON, J.; EDMONDS, J.




15 Cal.2d 161

**In re CONNOR.**

Cr. 4257.

Supreme Court of California.

Feb. 14, 1940.

**1. Habeas corpus ⇐3**

A defendant who sought to vacate judgment of conviction on sole ground that it was indefinite and uncertain could not subsequently attack judgment collaterally in habeas corpus proceeding on ground that he was denied assistance of counsel. Pen. Code, § 987.

**2. Habeas corpus ⇐1**

The function of "habeas corpus" is to test jurisdiction of court to render judgment and is not limited to face of proceeding, but extends to record of the court below when necessary to determine jurisdiction.

[Ed. Note.—For other definitions of "Habeas Corpus," see Words & Phrases.]

**3. Criminal law ⇐641(1)**

Where a defendant stated on his arraignment on preliminary examination that he did not need counsel, trial court was justified in taking him at his word and was not permitted to force counsel on him. Pen. Code, § 987.

**4. Criminal law ⇐641(1)**

The right of an accused to counsel may be waived by the accused. Pen.Code, § 987.

**5. Criminal law ⇐641(1)**

A defendant who on his arraignment before magistrate on his preliminary examination was fully advised of his right to counsel and stated that he did not need any and who failed to make any effort during the month intervening between his arraignment and his trial to obtain aid of counsel, could not claim that he was not afforded opportunity to obtain counsel to assist him. Pen.Code, § 987.

---

In Bank.

Proceeding in the matter of the petition of Frank S. Connor for a writ of habeas corpus. On motion by Attorney General for a diminution of the record and further certification.

Motion for diminution granted, and a supplemental return certified.

Joseph J. McShane, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a motion by the Attorney General of this state for a diminution of the record and further certification herein.

By an information filed by the district attorney of Los Angeles county the petitioner was charged in four counts with the robbery of gasoline stations and in a fifth count with the theft of an automobile. He was also charged with prior conviction of robbery, for which he had served a term of imprisonment, and with unlawfully carrying firearms. On February 18, 1932, he was arraigned before the superior court on said charges. He stood mute, pleas of not guilty were entered as to all the charges and the case was set for trial on March 17, 1932. On the trial before a jury the petitioner was found guilty on all counts of robbery and that they were robbery of the first degree, and was found guilty of the theft of the automobile. He was also found guilty of the prior conviction for robbery for which he had suffered a term of imprisonment. No appeal was taken from the judgment of conviction and the petitioner was delivered to the warden of the state prison at Folsom on April 8, 1932, at which institution he has since been confined. About two years later, on May 31, 1934, the petitioner made a motion in the trial court to vacate the judgment of conviction on the ground that it was indefinite and uncertain in that the term of imprisonment provided in the commitment could not be ascertained. The motion was denied. On appeal the order of denial was affirmed on January 16, 1935. People v. Connor, 3 Cal.App.2d 642, 40 P.2d 316. The petitioner's application to have this court hear and determine the appeal after decision by the District Court of Appeal was denied on February 14, 1935. 3 Cal. App.2d 644, 40 P.2d 316.

On August 21, 1939, the petitioner filed in this court his petition for a writ of habeas corpus wherein he claimed the right to his discharge from the state prison at Folsom because of the alleged invalidity of the judgment of conviction in that his rights under the federal and state Constitutions had been violated and particularly that he had been denied the assistance of counsel in his defense as guaranteed by those instruments and as also provided by section 987 of the Penal Code of California. In his petition he set forth the dates of his arraignment, trial, sentence and imprisonment as above indicated, and set forth as exhibits a copy of the information, a purported copy of the transcript of the proceedings at the time of his arraignment and plea; a purported copy of the reporter's transcript of the trial proceeding; a copy of the verdict on each count; and a copy of the judgment on each count.

The consideration of the petition for the issuance of the writ came on regularly before this court in bank on September 11, 1939, and the petition was denied.

[1] On the consideration of the petition, the record of this court on the petitioner's application for a hearing by this court, after decision by the District Court of Appeal on his appeal reported in 3 Cal. App.2d 642, 40 P.2d 316, was taken into account. It was there disclosed that the petitioner had, in a regular proceeding before the trial court, challenged the validity of the judgment he is now attacking; that he made no mention in that proceeding of the ground now relied upon to set aside the judgment. He could have urged the point in that proceeding and no special circumstances were shown why he should have been permitted, contrary to the gen-

eral rule, to try out his contentions piecemeal. In re Drew, 188 Cal. 717, 722, 207 P. 249. He could also have raised the point on appeal from the judgment of conviction. Not having done so, he may not, as he now attempts, attack the judgment collaterally. France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869; In re Gutierrez, 1 Cal.App.2d 281, 36 P.2d 712; In re Northcott, 71 Cal.App. 281, 235 P. 458.

[2] Furthermore, the function of habeas corpus is to test the jurisdiction of the court to render judgment. It is not limited to the face of the proceeding, but extends to the record of the court below when necessary to determine jurisdiction. In re Connolly, 16 Cal.App.2d 709, 715, 61 P.2d 490. There was before us upon a consideration of the petitioner's application on September 11, 1939, a certified copy of the transcript of the proceedings on the arraignment for plea of the petitioner on February 18, 1932. An inspection of that transcript, the authenticity of which could not be disputed, disclosed that the defendant on his arraignment was asked if he had an attorney and he replied: "I don't need any." Through inadvertence the transcript of said proceedings was not ordered filed in the office of the clerk of this court at the time the order of denial of the petition herein was entered on September 11, 1939, and diligent search has failed to locate that particular document. However, a duplicate certified copy of that transcript has since been obtained and should be made a part of the record herein.

Undoubtedly the record of the proceedings on arraignment, in which the petitioner stated that he did not need a lawyer, was within the contemplation and memory of the trial judge, when during the trial he stated to the petitioner, upon his then request for counsel, "I pointed out to you in the absence of the jury just what your status is so far as that is concerned."

The right of an accused to the assistance of counsel in his defense is guaranteed by both the federal and state Constitutions. To supplement the requirements of the fundamental law the Legislature in 1872 adopted section 987 of the Penal Code, which provides: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

[3-5] It may be true that the terms of the statute were not literally complied with at the arraignment of the petitioner for plea in the superior court. This was not true upon his arraignment before the magistrate on his preliminary examination, for he was then and there fully advised of his right to counsel and otherwise. From what took place on both occasions, we conclude that there was a substantial compliance with the statute and that the rights of the petitioner were not prejudiced by the form in which he was advised of his rights. When he said that he did not need counsel the court was justified in taking him at his word and was not permitted to force counsel upon him. Dietz v. State, 149 Wis. 462, 136 N.W. 166, Ann.Cas. 1913C, 732. His attitude was equivalent to a declination of counsel, the right to which could be waived. People v. Rocco, 209 Cal. 68, 285 P. 704; Gatlin v. State, 17 Ga.App. 406, 87 S.E. 151; State v. Terry, 201 Mo. 697, 100 S.W. 432; State v. Raney, 63 N.J.L. 363, 43 A. 677; Barnes v. Com., 92 Va. 794, 23 S.E. 784; State v. Yoes, 67 W.Va. 546, 68 S.E. 181, 140 Am.St.Rep. 978; State v. Fulco, 138 La. 995, 71 So. 134; Stokes v. State, 73 Ga. 816; 16 C.J. p. 821. The petitioner had been a bank clerk. He had been in the toils of the criminal law before, and had served a term after conviction of robbery. It may be assumed that he was not unfamiliar with court proceedings and that there is no injustice to him to apply the rules of waiver to his case in view of his undoubted familiarity with such matters and his attitude in court. A month intervened between his arraignment and his trial and there was no showing that he made any effort during that time to obtain the aid of counsel or of the court in procuring counsel. When he was confronted by a jury and the trial was on, he then for the first time demanded the assistance of counsel. Under these circumstances, the petitioner may not rightly claim that he was not afforded opportunity to obtain counsel to assist him.

The conclusions of the court at the time the petition herein was denied on September 11, 1939, were based on the matters then before the court and now sought to be made a part of the record to be certified to the Supreme Court of the United States in pending certiorari proceedings. Connor v. People, 60 S.Ct. 299, 84 L.Ed. —— The

additional matters should also be included, in order to correct the misstatements and omissions in the transcript of the proceedings inadequately incorporated in the petition. The motion for diminution should be granted and a supplemental return be certified accordingly.

It is so ordered.

GIBSON, Justice (concurring).

I concur in the order. Not having been a member of the court at the time of the consideration of the petition for habeas corpus, I cannot join in the recital of what occurred at that time.




15 Cal.2d 134

## In re PACIFIC COAST BUILDING–LOAN ASS'N OF LOS ANGELES.

## DRAPEAU, Building and Loan Commissioner, et al. v. CUSTODIANS OF TELLURIDE ASS'N et al.

L. A. 16540.

Supreme Court of California.

Feb. 8, 1940.

Rehearing Denied March 9, 1940.

**1. Corporations ⇐178**

A common stockholder of an ordinary business corporation is not a "creditor" of the corporation, and his claim would be subordinated to those of the creditors.

**2. Building and loan associations ⇐8(1), 42 (19)**

A sharp distinction exists between "guarantee stock" and "membership shares" of building and loan association, primary purpose of guarantee stock being creation of fund for protection of investors in association other than the holders of guarantee stock, including membership shareholders and investment certificate holders, and in liquidation, rights of holders of guarantee capital stock are subordinated to investment certificate holders and membership share holders. Gen.Laws 1931, Act 986, §§ 1.01, 3.04, 4.01, 7.01, 7.07, 13.16.

**3. Building and loan associations ⇐42(19)**

Where building and loan association issued guarantee capital stock, membership shares, and investment certificates, membership shareholders who became members of association with withdrawal privileges and were entitled to share in its management and profits and to borrow money on pledge of their shares, which were nonassessable, and were subject to association's liabilities, were required to be treated as "creditors" of the association upon its liquidation. Gen.Laws 1931, Act 986, §§ 1.01, 3.04, 4.01, 5.01, 5.03, 5.06, 7.01, 7.07, 13.16.

[Ed. Note.—For other definitions of "Creditor," see Words & Phrases.]

**4. Building and loan associations ⇐42(19)**

The statute which expressly places building and loan investment certificate holders in more favorable position than membership shareholders, in case of insolvency of association, gives preference only as to principal sums due, and not as to interest. Gen. Laws 1931, Act 986, § 5.01.

**5. Bankruptcy ⇐324**
**Receivers ⇐163**

One creditor is not entitled to payment of interest on his claim in receivership, bankruptcy, or other form of liquidation after commencement thereof, where assets are not sufficient to pay principal on all claims in full.

**6. Building and loan associations ⇐42(19)**

The holders of insolvent building and loan association investment certificates who were entitled upon liquidation of association to receive payment of principal sum due in full before any payment to association's membership shareholders were not entitled to payment of interest accruing during liquidation before payment of principal amount due on claim of membership shareholders. Gen.Laws 1931, Act 986, § 5.01.

CURTIS, J., dissenting.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in the matter of the liquidation of the Pacific Coast Building-Loan Association of Los Angeles, Cal., wherein Louis C. Drapeau, as Building and Loan Commissioner of the State of California filed a petition for directions with reference to disbursement of assets, and wherein H. P. Drake and others filed claims, and wherein the custodians of the Telluride

Association and others intervened. From an adverse order, the interveners appeal.

Affirmed.

Rehearing denied; CURTIS and HOUSER, JJ., dissenting.

Prior opinion, 84 P.2d 260.

H. R. Waldo, of Salt Lake City, Utah, and Drumm, Tucker & Drumm, of Santa Ana, for appellants.

Stanley M. Arndt, of Los Angeles, for Stanley Arndt, etc.

Albert Sidney Brown, and Brown & Brown, all of Los Angeles, for Elsie Jacobson.

Carpenter, Babson & Fendler, of Los Angeles, for Manly P. Hall and others.

W. W. Wallace, of Los Angeles, for Certain Membership Shareholders.

James C. Ingebretsen, and Robert Lee Collins, both of Los Angeles, for respondent Building and Loan Commissioner.

John C. Campbell, and Otto A. Ehlers, both of Los Angeles, (Franz R. Sachse, of Los Angeles, of counsel), for respondent Clarice B. Holmes.

Jess E. Stephens, H. L. Carnahan, and J. W. Mckinley, all of Los Angeles, for respondent H. P. Drake and others.

SHENK, Justice.

This is an appeal from an order of the superior court instructing petitioner and respondent, Building and Loan Commissioner of this state, as to the manner of payment of claims against Pacific Coast Building-Loan Association, in liquidation.

On January 11, 1932, the association being insolvent, the commissioner took possession of its business and assets, for the purpose of liquidation. On July 11, 1932, the superior court of Los Angeles county, the principal place of business of the association, upheld the action of the commissioner. He thereupon began to liquidate the assets and pay claims.

On March 25, 1937, the commissioner petitioned the superior court for instructions with reference to the payment of claims. It appeared that all general creditors had been paid in full; that holders of investment certificates had been paid principal and interest up to the time the business was taken over; that holders of membership shares had not been paid anything as yet, and that a substantial surplus remained in the hands of the liquidator. The holders of investment certificates demanded payment of interest on their claims for the period of liquidation. The holders of membership shares demanded that the principal of their claims be paid before any such interest was given to the investment certificate holders. In response to the commissioner's request for advice, the court ruled that the membership shareholders were creditors of the association; that no interest was payable to general creditors or investment certificate holders for any period since the commencement of liquidation until the principal sums of the claims of membership shareholders should be paid.

This appeal was taken by representatives of the investment certificate holders.

In figures, the facts are as follows: The membership shares, held by 4,400 owners, amounted to $3,420,563.07, $1,113,809.92 being pledged for loans, and $2,306,693.15 being "free" or unpledged. The investment certificates had claims in the sum of $3,556,897.35. General outside creditors had claims amounting to $5,950.90. It is estimated that only about $1,800,000 of additional assets will be recovered, with the certainty, therefore, that even without payment of interest to the investment certificates, the funds will be insufficient to pay membership shares in full.

The theory of appellants may be summarized as follows:

(1) Investment certificate holders are creditors of the association, entitled to the same preferential treatment as general creditors.

(2) Membership shareholders are stockholders, much like those of an ordinary business corporation; hence they are not creditors.

(3) Creditors of a corporation in liquidation are entitled to be paid in full on their claims before stockholders receive any payment on account of their shares.

(4) Payment in full includes interest during the period of liquidation and up to the time of payment. Whether such interest is claimed at the legal rate, or at the rates specified in the individual certificates (5 per cent, 6 per cent and 7 per cent) is not entirely clear.

[1] It is conceded that the investment certificate holders are creditors; the nature of their investment, as will hereinafter appear, is plain. It may be further granted that membership shareholders have some voice in the affairs of the corporation which the holders of investment

certificates do not have. Yet these concessions do not solve the problem, for they do not positively define the nature of the relationship of the membership shares to the corporation. One may, with assurance, declare that a common stockholder of an ordinary business corporation is not a creditor of the corporation, and his claim would be subordinated to those of creditors. Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328. But to conclude from this fact that a membership shareholder of a building and loan association cannot be a creditor in any sense is to ignore the peculiar character of such shares. Building and loan associations have grown rapidly in the past few decades, and have developed widely differing types of organization and stock structure. Membership, management, methods of raising capital, indeed, all their operations are so diverse that it is impossible to speak with precision of the relationships unless discussion is confined to a particular association formed under the laws of a single state. See, Sundheim, Building and Loan Associations, p. 12 et seq.; Fidelity Savings & Loan Association v. Burnet, 62 App.D.C. 131, 65 F.2d 477, 479. Even in our own state, as will appear, we must avoid hasty conclusions drawn from cases dealing with associations formed under old laws different from those in force today. Accordingly it is necessary to examine the organization and structure of this particular association in the light of the governing statutes, articles of incorporation, and by-laws. When we do we find that the membership share is a hybrid affair, the member having some of the characteristics of a stockholder and others of a creditor. Whether those elements which make him a creditor are of sufficient substance to warrant the procedure adopted by the lower court in this case is the question to be answered by our examination.

The association was incorporated in May, 1925, under the provisions of sections 634 and 648a of the Civil Code. These and other sections of the code dealing with building and loan associations were superseded in 1931 by the Building and Loan Association Act. Stats. 1931, p. 483; Deering's Gen.Laws, Act 986. Except as noted herein no material changes were made in the prior law by the new act which would affect this case; and the parties concede that the act governs these liquidation proceedings.

The said sections 634 and 648a of the Civil Code, as amended in 1907 and 1909, Laws 1907, p. 924, and Laws 1909, p. 721, established a new type of permissible capital structure for building and loan associations. The principal characteristic of the new plan was the provision for a guarantee capital stock, set apart as a fixed, non-withdrawable capital, to "protect and guarantee all other stockholders and creditors against any loss". Civ.Code, old sec. 634(d); see, also, Act, sec. 4.01. Such guarantee stock, or as an alternative, a certain fixed reserve fund, must be issued in certain percentages of the amount of outstanding investment certificates. Civ.Code, old sec. 634(e); Act, sec. 5.03. The theory behind this plan is that the other shares and certificates will receive a more or less fixed reasonable rate of return, with the guarantee stock (or reserve fund) as a protection, and that those who supply the capital for the guarantee stock will receive the entire surplus over the amount necessary to pay the fixed return to the other investors, and will also control the business. In brief, the guarantee stockholders take the risks, manage the affairs, and receive the profits in excess of the fixed charges. Only a few jurisdictions permit this type of association to be formed. Sundheim, Building and Loan Associations, p. 18.

Guarantee stock was authorized by out statutes in the following manner: Under section 634 of the Civil Code, an existing association could issue the new form of stock. Under section 648a, enacted in 1909, the corporation could, if desired, be formed with guarantee stock alone, thereafter obtaining working capital by issuance of membership shares, units or certificates. Pursuant to the statutory authority of section 648a, the present association was incorporated with guarantee capital stock only, and it then raised its working capital by issuance of membership shares and investment certificates. These will now be analyzed, as their nature appears in the statutes, articles and by-laws.

First, guarantee capital stock was authorized at $100 per share, the total authorized amount being 5,000 shares. The said stock is nonwithdrawable, and no loans can be made upon it. Civ.Code, old sec. 637. It must be kept unimpaired, guarantees losses, and is assessable and liable for debts. Civ.Code, old sec. 634(d); see, Act, secs. 4.01, 7.01. A majority of the

board of directors of the association (5 out of 9 members) must be selected from the holders of guarantee stock, and officers are chosen by this board. No action concerning financial matters can be taken except by affirmative vote of a majority of the whole board. In liquidation, after all claims and expenses are paid, a majority of the holders of such stock may have the surplus delivered to the association and obtain title again, free from the commissioner's claim. Act, sec. 13.16.

Second, membership shares were authorized. These are either full paid shares, prepaid shares, or instalment shares, all with a par value of $100. The instalment shares pay dues of 50 cents per month on each share until the payments and accrued dividends amount to $100. Dividends are paid or credited to the shareholders at rates fixed by the board of directors, there being no guaranteed rate. They have no further right to participate in profits, if such a dividend is specified. They have the right to borrow from the association and pledge their shares as security. The shares are non-assessable. Act, sec. 7.07. They are withdrawable, Act, sec. 3.02, and are subject to forced retirement in the discretion of the directors. Civ.Code, old sec. 635; Act, sec. 3.04. They (the members) are permitted to participate in meetings and vote their shares. The by-laws declare that membership shareholders "are members of the corporation, with all the rights, power and privileges incident thereto, including a right to vote at all meetings of the shareholders and members—one vote for each share—and are subject to the same restrictions and liabilities". However, it appears to have been the practice for these members at the time of application for membership shares to execute proxies in favor of the secretary.

The third classification was the investment certificate, a type of unsecured note or debenture, used by the association in raising funds from time to time, as needed. See, Act, sec. 5.01. The purchasers pay a certain sum and receive a certificate in a form similar to a promissory note, with attached interest coupons. The terms of the notes vary from one to three years. No dividends are paid, but a fixed sum as interest as specified, ranging in different instances from 5 per cent to 7 per cent. The certificates may be pledged for loans and are subject to enforced retirement or redemption. Act, sec. 5.06. The holders have no voice in management, do not participate in the business affairs, and the by-laws provide: "Holders of either form of these Investment Certificates are not members of the corporation and have none of the rights, powers and liabilities incident thereto." They are immune from liability for assessments or debts. Act, sec. 5.01. They have a special priority in the event of liquidation; they are "entitled upon liquidation of an association to receive payment in full before any payment or distribution shall be made to shareholders or stockholders". Act, sec. 5.01.

[2] It is apparent from the most cursory examination of the above that a sharp distinction exists between guarantee stock and membership shares. The definitions in the statute make this distinction at the outset. "Shareholder" is synonymous with "member" and means the holder of "shares". "Stockholder" means the holder of "stock". "Shares" refers to "withdrawable shares" which constitute "membership shares". "Stock" means "guarantee stock". Act, sec. 1.01; see, also, Civ.Code, old sec. 648a. The guarantee stock, as already pointed out, is permanent, non-withdrawable, assessable, and liable to claims of creditors. None of these things is true of membership shares. The guarantee stockholders take the major risk, and in return have the controlling voice in management (since a majority of the board must be selected from their group). They receive all the profits over the moderate return by way of interest or dividends going to others. The very name of the guarantee stock discloses a primary purpose, the creation of a fund for the protection of others who invest in the association, including membership, shareholders and investment certificate holders. In liquidation, their rights are expressly subordinated, not only to investment certificate holders, but also to membership shareholders. Act, sec. 13.16. These guarantee stockholders closely resemble the common stockholders of an ordinary business corporation, in both powers and liabilities, and bear no resemblance at all to the traditional members of a building and loan society or association. The membership shares, however, have none of these characteristics, but instead are of the familiar type found in the typical building and loan association. The power of the member to withdraw, and the power of the association to compel retirement, are signifi-

cant indications of the difference between ordinary common stock and guarantee stock on the one hand, and membership shares on the other.

Further study discloses a marked similarity between membership shares and investment certificates. The declared purpose of each type is to secure working capital, which means, it would seem, operating funds rather than an original stated capital or capital stock. Neither is assessable, neither is liable for debts. Both are withdrawable, and both are subject to forced retirement. Both may be pledged for loans. Both are protected by the guarantee stock, and such stock is subordinated to both in the payment of claims on liquidation. There is an obvious legislative purpose to treat these two forms of investment in most cases as substantially similar in so far as the rights of the investors are concerned.

What then are the differences between membership shares and investment certificates, upon which appellants rely? There are only three of consequence. First, the return on the investment differs. Investment certificate holders receive a fixed rate of interest. Membership shareholders are entitled only to dividends as determined by the board of directors. But such a dividend must be specified, or they share in the profits. In practice dividends are specified. The result is some more or less fixed return, in both types of investment, varying in not more than a few per cent. Second, the investment certificate holders have no voice in the management of the association. The membership shareholders may attend meetings and vote. This distinction is less impressive when we consider the fact that the majority of the board, with full control over financial matters, must be guarantee stockholders, so that in truth the membership shareholders only help select the management, but have no genuine power of management themselves. Third, the investment certificate holders have a liquidation preference. They are entitled to have their claims paid in full before any payments are made to other kinds of shares (except in the case of exchangeable shares under late legislation).

[3] We should not be led astray, when observing these differences, and come to the hasty conclusion that they determine a point which, upon further consideration, has nothing to do with them. The difference in voting rights, for example, is not conclusive. Suppose the certificate holders were themselves given a vote. Would this outweigh all the other factors which make them creditors and itself turn them into stockholders? Obviously it would not. Nor does the liquidation preference of investment certificates have the effect claimed by appellants. The investment certificate holder is without doubt a preferred creditor, but this does not make the membership shareholder any less a creditor, though an inferior one. In short, it appears that the membership shares are fundamentally similar to the investment certificates, and the differences noted are not of such significance as to overcome this similarity, in respect of the rights of the investor against the association. We conclude that the membership shareholders are creditors of the association.

The cases relied upon by appellants to deny the status of creditors to holders of such shares are all distinguishable.

Groover v. Pacific Coast Savings Society, 164 Cal. 67, 127 P. 495, 43 L.R.A., N.S., 874, Ann.Cas.1914B, 1261, was an old form of association, incorporated prior to the statutes of 1891 governing building and loan associations, and whether its structure bore any substantial resemblance to that of the association here involved does not appear. But aside from this, the issue in the case was whether upon insolvency borrowing instalment shareholders should be given a credit on their debts in the amount of payments made on their stock. It was held that to permit this would be to discriminate against nonborrowing members and outside creditors, and to violate the equitable principle of equality. In the course of its opinion the court referred to the distinction between a stockholder and a borrower, and held that the dual position of the borrowing stockholder could not be ignored. In the present case many of the borrowing shareholders were credited with their share payments, and no complaint was made as to this action. The problem before us here, as to the respective rights of membership shareholders and investment certificate holders, is one upon which the Groover case throws no light. Not only was the controversy there over a different issue, but it does not appear that there were any investors in a position comparable to that of the investment certificate holders.

Pacific Coast Savings Society v. Sturdevant, 165 Cal. 687, 133 P. 485, 49 L.R.A.,

N.S., 1142, a case involving the same association as the Groover case, was concerned solely with the question whether stockholders whose stock had matured and who had given notice of withdrawal and demand for payment prior to insolvency, were entitled to priority over other stockholders, in liquidation. The court held that the principle of equality among members applied; that all should be treated alike, without preference; and that the notice of withdrawal and demand did not change them into general creditors with a right to preferential treatment. Again it must be emphasized that the conflict there was between members or stockholders, and no class of investment certificate holders existed. As for the general language of this and the preceding case, far from supporting the position of appellants, it is actually contrary thereto, for it stresses the principle of equality among those similarly situated. As we have already shown, the marked similarity between membership shares and investment certificates would, under the language of both these cases, suggest the denial of preferences rather than the giving of them.

Equally distinguishable are several federal cases cited by appellants. In Fidelity Savings & Loan Ass'n v. Burnet, 62 App. D.C. 131, 65 F.2d 477, an association with both guaranty stock and membership shares, the only question was whether the normal return paid to the membership shares was "interest", deductible under the Revenue Act of 1921, 42 Stat. 227, or "dividends" which would be nondeductible. The court concluded that the shareholders were not creditors receiving interest, but stockholders receiving dividends, and that these were not deductible payments. There is no reason to dispute the soundness of this conclusion, for the court was dealing with a solvent association, and the question of rights in liquidation was not at all involved. As will hereinafter be seen, the court expressly recognized that an entirely different view is properly taken upon insolvency. In Harry E. Jones, Inc., v. Kemp, 9 Cir., 74 F.2d 623, and Barrymore v. Kemp, 9 Cir., 69 F.2d 335, the sole question was whether investment certificate holders were entitled to parity with general creditors in payments on liquidation. There was no consideration given to the status of membership shareholders in either case.

On the other hand there are several decisions which have, in various situations, recognized that members or shareholders of an insolvent association in liquidation may be treated as creditors.

In re Western States Building-Loan Ass'n, D.C., 50 F.2d 632, 633, was a bankruptcy proceeding, and the question was whether certificate holders or shareholders were creditors with provable claims. Emphasizing the right of withdrawal, the court said: "It is to be noted that the contract relationship established does make the association the debtor of its shareholder", and went on later to explain: "When an association is forced into liquidation, and as a consequence is in a position no longer to fulfill its obligations, it must be that the debt matures, and that, in whatever fund is realized upon a sale of the assets, the debtor or shareholder is entitled to participate." In Fidelity Savings & Loan Ass'n v. Burnet, supra, strongly relied upon by appellants the Western States case is considered and distinguished, the court conceding that upon insolvency, the shareholder gains the rights of a creditor. Likewise, the case of In re Guaranty Building & Loan Ass'n, D.C., 49 F.2d 776, 778, while denying shareholders the right to institute bankruptcy proceedings, recognizes that "they become invested with the character of creditors upon the adjudication in bankruptcy". See, also, Sundheim, supra, sec. 193; Rummens v. Home Savings & Loan Ass'n, 182 Wash. 539, 47 P.2d 845, 100 A.L.R. 570; Mott v. Guardian Bldg. & Loan Ass'n, 140 Or. 489, 14 P.2d 447.

[4, 5] From the foregoing discussion, it must be concluded that the membership shareholders herein are to be treated as creditors of the insolvent association in liquidation. With this established, the determinaton of the precise point at issue becomes a relatively simple matter. We are not concerned with the rights of general outside creditors, which are universally conceded to be prior to those of members. Our only problem is to determine the rank of the claims of shareholders and investment certificate holders. The statute expressly places the investment certificate holders in a more favorable position than the membership shareholders; but this does not warrant the courts in still further extending the preferential position established by statute. The law gives preference in the matter of payment of the claim, which, reasonably interpreted, means the principal sum due; and this claim has already been satisfied in full. As to interest the statute is silent.

And, in view of that silence, the statutory preference should logically end at that point, and the problem must then be solved in accordance with the usual equitable principle governing liquidation, namely, the principle of equality among creditors. Stated broadly, the rule is that one creditor is not entitled to payment of interest on his claim in receivership, bankruptcy, or other form of liquidation, after the commencement thereof, where the assets are not sufficient to pay the principal of all claims in full. See, Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328; Glenn on Liquidation, secs. 488, 510.

[6] The above rule was announced by this court recently, upon a full review of the authorities, in Greva v. Rainey, supra. A bank was in liquidation and the respective rights of stockholders and various depositors were involved. This court held first that the depositors, as creditors, were entitled to payment of not only the principal of their clams but interest during liquidation, before any payments should be made to stockholders. This distinction between the rights of creditors and stockholders is well settled, and as applied to the present case, would mean that any of the various kinds of creditors of the association would be entitled to interest as against the guarantee stockholders. The second holding in the Greva case was that as to the different classes of depositors, that is, those in the commercial and those in the savings departments, neither should receive interest until payment of the entire principal sum to all. We said (2 Cal.2d page 346, 41 P. 2d page 331): "The decisions * * * are uniform to the effect that in so far as is possible the creditors of an insolvent debtor must be treated on a basis of equality. * * * That, indeed, is the premise from which springs the rule that interest ordinarily will not be computed nor paid from the date of the suspension of business, or commencement of the receivership or other liquidation procedure. Therefore, there being but one debtor involved, all creditors are entitled to equal consideration except where the statute expressly provides otherwise, and then only to the extent provided." And quoting from People v. American Loan & Trust Co., 172 N.Y. 371, 65 N. E. 200, we said further (2 Cal.2d page 347, 41 P.2d page 332): "As the statute does not say that preferred claims shall be paid with interest to the date of payment, the courts should not, because the claims of substantially all the creditors, both preferred and unpreferred, were alike in origin, for they were created by the deposit of money; and preferences in derogation of the common law should not be extended by construction beyond the express command of the statute."

It follows that the lower court correctly instructed the respondent Building and Loan Commissioner as to the apportionment of funds in payment of claims against the association.

The order is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; GIBSON, J.; CARTER, J.

CURTIS, Justice.

I dissent. I take issue with the following statement found in the early part of the majority opinion: "The theory behind this plan [the plan under which said association was organized] is that the other shares [membership shares] and certificates will receive a more or less fixed reasonable rate of return, with the guarantee stock (or reserve fund) as a protection, and that those who supply the capital for the guarantee stock will receive the entire surplus over the amount necessary to pay the fixed return to the other investors, and will also control the business. In brief, the guarantee stockholders take the risks, manage the affairs, and receive the profits in excess of the fixed charges." The opinion is based solely upon this theory. The substance of the entire theory is stated in the last sentence of this statement. This statement, in my opinion, does not correctly set forth the respective rights, duties and obligations of the guarantee stockholders and the holders of membership shares.

In the first place, the guarantee stockholders do not take the risks of the association alone, but assume them only in part and jointly with the holders of membership shares. If the association fails to make any profit, after paying the general running expenses of the association and the interest due on the investment certificates, the holders of membership shares, like the guarantee stockholders, receive no return on their investment. If there is a surplus after paying these expenses and interest, this surplus may be paid out in dividends to both the guarantee stockholders and the holders of membership shares. The holders of membership shares are entitled to dividends at the same rate as is allowed the guarantee stockholders. The only risk as-

sumed by the guarantee stockholders, not assumed by the membership shareholders, is that the stock of the former is liable for assessment and to creditors.

The claim that the guarantee stockholders have the controlling voice in the management of the association is based upon a provision of the by-laws that five out of nine directors must be guarantee stockholders, but these five directors, as well as the other four directors, are elected by the combined votes of the guarantee stockholders and the holders of membership shares, each entitled to one vote. From the character of an association organized like the Pacific Coast Building-Loan Association, it is obvious that the number of membership shares would exceed by far the guarantee stock. It was so in the present association as the holders of membership shares largely predominated over the guarantee stockholders in the proportion of over ten to one. There were 2,755 shares of guarantee stock, and over 34,000 membership shares outstanding at the time this association was taken over by the commissioner. The shareholders, therefore, were able to control the election of the board of directors, who in turn managed the affairs of the association. While it is true that five of the nine directors were required to be holders of guarantee stock, if they owed their position to the vote of the holders of membership shares, it is only reasonable to assume that they would carry out the wishes of the power that elected them. Furthermore, there were twenty-nine holders of membership shares, who were also holders of guarantee stock. There was nothing to prevent the membership shareholders from casting their votes for at least five of these holders of both guarantee stock and shareholder stock, and together with the four that they might elect from their own membership, elect a board of directors consisting wholly of holders of membership shares. In such an event, which is not only possible but probable in the management of an association with a corporate structure like the Pacific Coast Building-Loan Association, the management of the association would be in the entire control of the holders of membership shares. It is not correct, therefore, to say that the guarantee stockholders manage the affairs of the association. They may do so only with the consent and approval of the holders of membership shares. The latter are legally the controlling factor in the management of the affairs of the association. The majority opinion refers to the custom of holders of membership shares to execute proxies in favor of the secretary, but they were under no legal obligation to execute such proxies, and they might recall them at any time.

Neither can it be correctly said that the guarantee stockholders receive the profits in excess of the fixed charges. The fixed charges are the expense of conducting the association and the interest on borrowed money, including the interest on the investment certificates. After these charges have been paid, the balance, if any, belongs to the stockholders, both guarantee stockholders and membership shareholders, and may be paid to them in dividends. The dividends are declared by the board of directors and must be paid equally on the stock, both of the guarantee stockholders and that of holders of membership shares. This dividend is not a fixed charge, but is only payable by resolution of the directors and when declared is paid alike to both classes of stockholders.

It is apparent therefore, that the distinction which the majority opinion makes between these two classes of stockholders has little, if any, basis to support it. On the other hand, these two classes do possess many points of similarity which would indicate that they are each stockholders of the association, although they may not have equal rights in the corporate property, and their duties and liabilities may differ in some respects. They each are members of the corporate body. They have equal voting privileges. The members of each class may act as directors and officers of the association. They are entitled to equal dividends on their stock. These rights and privileges are usually enjoyed only by stockholders of a corporation, and when they arise by reason of a person's relation to a corporation, invariably constitute that person a member of a corporation. Then again the name of the security—"membership shares"—is a clear indication that it was intended that the owners thereof were to be stockholders in the corporation. The word "shares", when used in connection with an interest in a corporation, invariably denotes the interest a stockholder has in the corporate property. Not content with designating the corporate interest of this class of investors in a building association as a "share", the Act went further and described it as a "membership share", further indicating that the owner thereof was to be a member of the corporation or a stockholder thereof.

It is true that the guarantee stockholders were entitled to participate in the reserve fund, which right was not enjoyed by the holders of membership shares, but this right given to the former does not affect the status of the latter as members of the corporation. Mere inequality in the right of different classes of stockholders to share in the profits of the corporation does not take either class out of the stockholders' status. Section 290 of the Civil Code provides for different classes of stockholders with different rights and liabilities, yet all are stockholders of the corporation. The laws of this state permit the formation of a corporation with preferred and common stock. The rights of these two classes of stockholders to share in the profits of the corporation are different, yet the members of each class are stockholders.

There may be other slight differences between the rights and liabilities of guarantee stockholders and those of holders of membership shares, but they are not so fundamental that they change the character of the latter and constitute them creditors instead of stockholders, when they possess all the characteristics of stockholders above enumerated.

Particular reliance is placed in the majority opinion upon the right of withdrawal which may be exercised by holders of membership shares, which right is not enjoyed by guarantee stockholders. Conceding that after this right has been exercised by shareholders, those exercising such right thereafter become creditors of the corporation and can no longer be regarded as stockholders, it does not follow that prior to exercising this right of withdrawal and from the inception of their acquiring membership shares, they were merely creditors. After exercising their right of withdrawal pursuant to the by-laws of the association, their only right therein was to receive the amount due on their surrendered shares. The association then owed them a debt, and that was its only obligation to them, and that was their only right. Prior thereto, their rights were entirely different. Before notice of withdrawal they had no right to demand of the association the amount called for by their shares, but were remitted to dividends on their shares. As we have seen, prior to withdrawal, they had all the rights of a stockholder including not only the right to receive dividends on their stock, but the right to vote at all its meetings, act as a director and officer of the association, and as we have seen, through this right they had a part in, and it was even within their power, acting in conjunction with other holders of membership shares, to actually manage the affairs of the corporation. It seems too clear for argument that by exercising their right of withdrawal their status had been completely changed. Their rights as shareholders had been wiped out, and the new rights as creditors had been created.

Those holders of membership shares, who were such at the time this association was taken over by the Building and Loan Commissioner for the purpose of liquidation, and they include all such shareholders who are now contending that they are mere creditors of the association, occupy an entirely different position. Respecting the rights of such shareholders, who attempted to withdraw after the Building and Loan Commissioner took over the association for the purpose of liquidating, the accepted rule is, "the rights of withdrawal 'are provided for with respect to going concerns only.' Reddick v. United States B. & L. Ass'n, 106 Ky. 94, 49 S.W. 1075; Hohenshell v. Home B. & L. Association, supra [140 Mo. 566, 41 S.W. 948]." Pacific Coast Savings Society v. Sturdevant, 165 Cal. 687, 133 P. 485, 488, 49 L.R.A.,N.S., 1142. In that case, this court further said, (165 Cal. page 694, 133 P. page 488, 49 L.R.A.,N.S., 1142) "Assuming that a notice of withdrawal given and accepted while the society is actually solvent gives stockholders so withdrawing the status of creditors after the lapse of the time required for notice, we think the burden is upon a stockholder seeking to show that his status has been changed to that of a creditor to allege and prove the essential fact that the corporation, admittedly insolvent at the time the distribution is sought, was not insolvent when the alleged right of payment accrued."

The Sturdevant case was cited with approval in Fidelity Savings & Loan Association v. Burnet, 62 App.D.C. 131, 65 F.2d 477, 481, where the court referring to the Sturdevant case construed it as follows: "In Pacific Coast Sav. Soc. v. Sturdevant, 165 Cal. 687, 133 P. 485, 49 L.R.A.,N.S., 1142, a building association had become insolvent. Certain of its stockholders who had the right of withdrawal had given notice of their intention to withdraw. The question was, Did they, by virtue of this notice, change their position from stockholders to creditors, or, as stated by the Supreme

Court of California, did they by this fact cease to be stockholders and become creditors. The court answered this question in the negative. It is quite true in that case no guaranty stock had been sold and issued, and therefore the provisions of the law subordinating that stock to the other stock did not apply, but the principle decided was conclusive of the legal relation of such shareholders to the association, that is to say, that they did not occupy to the association the same aspect as a depositor to a savings bank. And this, it seems to us, is necessarily correct, for, if it were held that the fact of the issue by the association of permanent stock itself made all other classes of stock debts, and all other stockholders creditors, it might, by the issuance of a negligible amount of guaranty stock relieve practically all of its assets from liability to general creditors except upon an equality with shareholders participating in the conduct of the association's affairs. Hence it would seem to us that the fact of the issue by the company of guaranty stock has no such significance as is claimed."

The case of Cook v. Emmet Perpetual & Mutual Bldg. Ass'n, 90 Md. 284, 44 A. 1022, holds that general creditors are entitled to preference over stockholders who gave notice of withdrawal before judicial determination of insolvency where the association was in fact insolvent when the notice was given.

In the present case, it was judicially determined that the Pacific Coast Building-Loan Association was insolvent on January 11, 1932, the day the Building and Loan Commissioner took possession of it for the purpose of liquidation, and it follows from the above authorities that any withdrawal, or any notice of withdrawal, after that date, was ineffectual to transform the stockholder attempting thus to withdraw into a creditor of the corporation.

The main authority relied upon by the majority opinion as holding that these shareholders are creditors of the association is the case of In re Western States Building-Loan Association, D.C., 50 F.2d 632, 633, in which it was held in effect that the right of a holder of membership shares created the association the "debtor of its shareholder" and accordingly holders of membership shares were creditors, and were entitled to sign a petition in involuntary bankruptcy proceedings. This case is out of line with the decision in the case of Fidelity Savings & Loan Association v. Burnet, supra, and the other cases relied upon above. The court in the Fidelity Savings & Loan Association case, supra, refused to follow the earlier case of In re Western States Building-Loan Association, supra. The last named case is a decision of the United States District Court and was rendered by an individual judge while the decision in the Fidelity Savings & Loan Association was by the Circuit Court of Appeals and was the unanimous conclusion of four justices of that court. I submit that, with due deference to the ability of the eminent jurist who wrote the earlier decision, the latter one is entitled to greater weight, as it is later in date, was rendered by a higher court, and was approved by four eminent justices thereof, while the first opinion had only the approval of a single member of the court. But independent of the weight to be given these opinions of the federal courts, the question before us is the construction of a statute of this state. The court in the Fidelity Savings & Loan Association, supra, cited and relied upon two decisions of this state, the Sturdevant case, supra, and Groover v. Pacific Coast Savings Society, 164 Cal. 67, 127 P. 495, 43 L.R.A., N.S., 874, Ann.Cas.1914B, 1261, and is, therefore, in harmony with the law as declared by the decisions of this state, while the decision in the Western States Building-Loan Association makes no reference to either of these two cases, or any other decision of this, or any other appellate court of this state. For this reason alone, the decision in the Western States Building-Loan Association case, supra, should not be followed by the courts of this state.

The only correct conclusion that can be reached in this case, in my opinion, is that holders of membership shares are members of the association, and therefore are stockholders; that holders of investment certificates are creditors of the corporation, and are, therefore entitled to be paid in full, principal and interest, before anything is paid to the stockholders. The case of Greva v. Rainey, 2 Cal.2d 338, 41 P.2d 328, cited in the majority opinion, has no application in this case, as the controversy involved there was between two classes of bank depositors, all of whom were concededly creditors of the corporation. In reaching this conclusion it is not necessary to rely upon section 5.01 of the Building and Loan Act, which expressly provides that, "The holders of investment certificates * * * shall be entitled upon liquidation

of an association to receive payment in full before any payment or distribution shall be made to shareholders * * *." The judgment should be reversed with directions to the building and loan commissioner to pay to the holders of investment certificates, interest upon the amount due them on their investment certificates from the date on which the commissioner took over said association for the purpose of liquidation, to the date of payment.




15 Cal.2d 155

**In re PACIFIC COAST BUILDING–LOAN ASS'N OF LOS ANGELES (two cases).**

**CRAEMER v. DRAKE et al.**

**SAME v. HOLMES et al.**

**L. A. 16682, 16699.**

**Supreme Court of California.**

**Feb. 8, 1940.**

**Rehearing Denied March 9, 1940.**

**1. Costs ⇐103**

**Where a common fund exists to which a number of persons are entitled and a representative suit is brought by one for benefit of the others to obtain, preserve, or protect the fund, party bringing suit may be awarded costs including counsel fees out of the fund.**

**2. Costs ⇐103**

**Where building and loan commissioner as liquidator of building and loan association petitioned for instructions concerning ranking of claims of investment certificate holders and membership shareholders of association, and commissioner who took neutral position acted in good faith and adequately presented legal questions involved, membership shareholders whose claims were allowed were not entitled to have their attorneys' fees paid out of fund which was under administration of commissioner, since proceeding was not to obtain or protect a common fund and was not a "representative suit" on behalf of beneficiaries of fund, notwithstanding conflicting claims to the fund.**

**3. Costs ⇐103**

**Where building and loan commissioner as liquidator of building and loan association petitioned for instructions concerning ranking of claims of investment certificate holders as membership shareholders of association, membership shareholders who were successful in the litigation were not entitled to have their attorneys' fees paid out of fund in hands of commissioner, on ground that legal presentation by their attorneys was more convincing and valuable than that of commissioner.**

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in the matter of the liquidation of the Pacific Coast Building-Loan Association of Los Angeles, wherein Justus F. Craemer, successor to Louis C. Drapeau, as Building and Loan Commissioner of the state of California, was a petitioner, and wherein H. P. Drake and others filed claims, and proceeding in the matter of the liquidation of the Pacific Coast Building-Loan Association of Los Angeles, California, wherein Justus F. Craemer, successor to Louis C. Drapeau, as Building and Loan Commissioner of the state of California, was a petitioner and Clarice B. Holmes and others filed claims. From adverse orders, claimants appeal.

Affirmed.

Prior opinion, 84 P.2d 263.

H. L. Carnahan and J. W. McKinley, both of Los Angeles, for appellants H. P. Drake and others.

John C. Campbell, Otto A. Ehlers, and Franz R. Sachse, all of Los Angeles, for appellants Clarice B. Holmes, Paul H. Ehlers, and Flora A. Ehlers and others.

Robert Lee Collins and James C. Ingebretsen, both of Los Angeles, for respondent Building and Loan Commissioner.

SHENK, Justice.

In the case of In re Pacific Coast Building-Loan Association, Cal.Sup., 99 P.2d 251, this day decided, the Building and Loan Commissioner, as liquidator of Pacific Coast Building-Loan Association, petitioned the superior court for instructions concerning the ranking of claims of investment certificate holders and membership shareholders of the association. His petition showed that investment certificate holders had been or would be paid the principal of their claims in full, and a question had arisen as to whether they should be paid interest thereon for the pe-

riod of liquidation, in which event the assets would be insufficient to pay even the principal of the claims of membership shareholders. A hearing was had, at which various investment certificate shareholders and membership shareholders appeared by counsel and argued the matter at length. The trial court decided in favor of the claims of membership shareholders, ordering payment of their principal before any interest during liquidation might be paid to investment certificate holders. On appeal, we have affirmed the order.

After the lower court's order, two groups of counsel representing the successful membership shareholders moved the court for an allowance of attorneys' fees for their services in the proceeding, to be paid out of the assets of the association. The court denied the motion. In its memorandum opinion explaining the denial of the motion of H. P. Drake et al., the court declared that in its opinion the services were of the value of $15,000, and that said sum would be allowed if the moving parties were entitled to any allowance. But the court further declared "that this proceeding is not of the character which entitles a successful group to recover attorneys' fees from the common fund and upon that ground alone the application was denied". A similar order was made with respect to the application of counsel for Clarice B. Holmes, et al., who sought an allowance of $3,000. (In re Pacific Coast Building-Loan Association, L. A. No. 16699.) An appeal was taken from the order in each case. As the same question is involved in both, the appeals will be disposed of in this opinion and order.

The record in the main appeal leaves no doubt as to the ability and industry of counsel for these groups of membership shareholders, and we find no reason to question the trial court's conclusion as to the value of their services. The sole question, as said court pointed out, is whether the proceeding was a proper one for the award of attorneys' fees. In our opinion it was not.

[1] The doctrine invoked by appellants is one well established in equity. In brief, the rule is that where a common fund exists to which a number of persons are entitled, and a representative suit is brought by one or more for the benefit of the others, to obtain, preserve, or protect the fund, such party or parties suing may be awarded costs, including counsel fees, out of the fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them. See, generally, Trustees of Int. Imp. Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157; Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; notes, 49 A.L.R. 1149; 107 A.L.R. 749; McCormick on Damages, p. 237. The doctrine was applied in this state in Alemany v. Wensinger, 40 Cal. 288, and approved, though denied application in County of Tulare v. Dinuba, 205 Cal. 111, 270 P. 201, where the court discussed its limitations. In the latter case the county was entitled to a fund, and a suit was brought by a private attorney to obtain it for the county. Attorneys' fees were denied on the ground that the county had official legal representation by its own law department, under a statutory duty to perform that very service. This court observed (205 Cal. page 127, 270 P. page 208): "The fact that one may be benefited by an action brought by another is not of itself sufficient to justify a court in assessing costs against the one who also profits by said action. Some contractual relation or some equitable reason sufficient to support an allowance of costs must be shown to exist to justify a court of equity in making such assessment."

[2] In order to determine whether an award was appropriate in the present case we must see what proceedings were taken. The first step was the commissioner's petition on March 25, 1937, in which he set forth certain payments, described the remaining assets, asserted that he was a "disinterested stakeholder", and requested a decree declaring the relative rights of the rival claimants. The court fixed a date for hearing of the petition, directed notice to be given by publication and mail, and authorized any interested party to appear and file pleadings or points and authorities. Counsel appeared on behalf of custodians of Telluride Association, substantial holders of investment certificates. Thereupon H. P. Drake, a large holder of membership shares, communicated with many other such shareholders, informing them that he had engaged counsel to represent them and asking subscriptions for this purpose, adding that counsel, if retained, would petition the court for an allowance of fees and expenses. A large number of shareholders responded, and from their subscriptions Mr. Drake paid his attorneys a retainer of $1,000. At this time counsel also appeared

for Clarice Holmes and several others who joined with her and are appellants herein. Thereafter said counsel filed points and authorities and argued the matter. The result, as already pointed out, was a decision in favor of the membership shareholders.

The appellants contend that the action taken by Drake and the others was necessary to preserve the rights of the entire group of membership shareholders because the commissioner took a neutral position, and made no attempt to decide the issue of priority or to advise the court thereon. The particular complaint, however, is simply that the commissioner did not take sides. In fact, he did advise the court; through his counsel he furnished points and authorities covering the issues of fact and law, and participated in the oral argument. It is not, and could not be seriously contended, that he acted other than in good faith, and we have no reason to doubt the adequacy of the legal presentation to the court. It is quite obvious that he had to take an impartial position, seeking that form of distribution which was in accord with legal and equitable principles. And there is nothing in the record to show that the court was not fully advised on the law by counsel for the commissioner, despite the fact that they did not appear as advocates of either group of claimants.

Under these circumstances, it does not seem to us that a proper case was presented for the doctrine invoked by appellants. The proceeding was not, in the first place, a suit to obtain or protect a common fund. The fund was already there, and was under the administration of a statutory officer charged with its protection and proper distribution. Counsel for appellants did not make it available; the commissioner made it available. In the second place, this was not a representative suit on behalf of beneficiaries of the fund, against adversaries improperly withholding a fund. It was a proceeding initiated by the commissioner for the purpose of making an equitable and proper distribution of the fund. Appellants appeared by invitation of the court, but they did not commence nor control the proceeding. All the steps taken in the proceeding which ultimately benefited the shareholders were commenced by the commissioner and the proceedings would have followed the same course if appellants had not appeared. In short, the commissioner, legally charged with the duty of protecting the interests of the membership shareholders as well as other claimants, presented the legal issue of priority to the court, and the court, in the exercise of its judgment, decided the issue in favor of the membership shareholders. To assert that the efforts of counsel for appellants were necessary to create or preserve the fund, is to imply incompetency or dereliction in duty in the commissioner or the court, and no such charge is in fact made, or could be made. As the court said in General Finance Corp. v. New York State Rys., D. C., 3 F.Supp. 975, 976: "In the case at bar the petitioning attorney did not create this fund. The fund existed and was in the hands of the receivers for distribution. It cannot be said that the efforts of the petitioner secured the fund. The receivers were represented by counsel, and there was no danger that the fund would be dissipated or negligently administered * * *." See also County of Tulare v. Dinuba, supra.

[3] Indeed, appellants must really rest upon the narrow ground that their legal presentation was more able, more convincing, and therefore more valuable, than that of the commissioner. But this cannot be a basis for the award of fees to private counsel where the services are already subject to performance by a public officer and official counsel, and these parties have properly performed their duties. Nor is it possible to say that the mere conflicting claims between the parties entitled to distribution herein makes this a characteristic representative suit to obtain a fund. It does not take much imagination to conceive of a fund which would be properly administered by a statutory liquidator, and distributed among numerous conflicting claimants, but which could be wholly dissipated if each rival group treated the distribution as an adversary proceeding, and all produced private counsel to assert their priorities.

It follows that the lower court was correct in concluding that counsel fees should not be allowed.

The orders are affirmed.

We concur: WASTE, C. J.; GIBSON, J.; CARTER, J.; EDMONDS, J.

I concur in the judgment: CURTIS, J.

**SEE v. JOUGHIN et al.**

**L. A. 17105.**

Supreme Court of California.

Feb. 14, 1940.

Rehearing and Modification Denied

March 14, 1940.

**Appeal and error ⇐659(3)**

**Where action was dismissed on ground that issues had been determined between the parties in former action, and counsel for defendants, in belief that bill of exceptions did not adequately include judgment roll in former action, procured entry in trial court of an order nunc pro tunc including in bill of exceptions the judgment roll in former action, the Supreme Court in response to motion by plaintiff for diminution of the record would cause to be included in the record on appeal the certified copy of the nunc pro tunc order and the clerk's transcript on the appeal in the former action, without prejudice to consideration of the validity of the nunc pro tunc order.**

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Zilla Grace See against Lizzie Joughin, etc., and others. From a judgment dismissing the action, plaintiff appeals. On motion by plaintiff to modify and make more certain an order theretofore entered by the Supreme Court.

Motion granted as indicated in opinion.

D. G. Kling and D. A. Knapp, both of Los Angeles, for appellant.

Bonpane & Prince, Blase A. Bonpane, and Charles A. Prince, all of Hollywood, for respondents.

George P. Adams and Charles Beardsley, both of Los Angeles, for respondent Carl Bilger.

Eckman & Lindstrom, of Los Angeles, for respondent Lizzie Joughin.

PER CURIAM.

This is a motion by the plaintiff and appellant to modify and make more certain an order of this court made on December 5, 1939, pursuant to the motion presented on that day by counsel for the defendants and respondents for a "diminution of the record and for an order permitting the correction of an error and defect in the transcript on appeal, by filing as an amendment thereto a document entitled, 'Order Amending Engrossed Bill of Exceptions, Nunc Pro Tunc' ", a certified copy of which order was appended to the notice of motion. In granting the motion the following minute order appears: "Appellant allowed thirty days to file supplemental transcript and opening brief; usual time for further briefs."

The appellant's opening brief was on file at the time the foregoing motion for diminution was made.

The appeal herein is from a judgment dismissing the action on the ground that the issues had been determined between the parties in a former action (See v. Joughin, 18 Cal.App.2d 414, 64 P.2d 149, action No. 369870 in the superior court), and were therefore res judicata. Counsel on the present appeal apparently concluded that the bill of exceptions did not adequately include the judgment roll in the former action, an inspection of which caused the trial court to dismiss the action. To safeguard the point counsel for respondents obtained from the trial court an order, nunc pro tunc as of the day of the settlement of the bill of exceptions, including in said bill the judgment roll in the former action. The motion of respondents for diminution of the record was based on the claim, supported by affidavit of the trial judge, that he had examined the judgment roll in the former action, had determined therefrom that the issues in the present action were res adjudicata and that said judgment roll had inadvertently been omitted from the bill of exceptions on this appeal. The motion in this court was for diminution of the record to include in the record on this appeal the nunc pro tunc order and the judgment roll in the former action. The motion was granted on December 5th last, but the minute order did not specify how the judgment roll in the former action should be brought up. Counsel for the appellant suggests several alternatives, but only one need be employed. The clerk's transcript on the appeal in the former action is now lodged with the clerk of this court. That transcript contains the judgment roll in the former action, with very little additional matter. There appears to be no good reason why that transcript should not be considered a part of the record on the appeal in the present action without further printing or transcribing, and be referred to in all respects as though it had been included originally in this bill of exceptions.

The minute order of December 5th should therefore be modified to read as

follows: "Motion for diminution of the record is granted; and it is ordered that the certified copy of the nunc pro tunc order, appended to the respondent's notice of motion for diminution of the record filed herein, be deemed a part of the record on this appeal, and that the judgment roll in the case of See v. Joughin, Los Angeles Superior Court, No. 369870 in the Superior Court, as contained in the Clerk's transcript of the record on appeal in the former action, be deemed a part of the bill of exceptions on the appeal in the present action, all without prejudice, however, to the consideration on this appeal of the validity and effect of said nunc pro tunc order. Appellant is allowed thirty days from and after the filing of this order to file a supplemental opening brief, usual time for further briefs."

It is so ordered.




15 Cal.2d 173

## PORTER v. VAN DENBURGH.

L. A. 16169.

Supreme Court of California.

Feb. 14, 1940.

**1. Trusts ⇐119**

The ambiguity inherent in word "profits," as used in instrument issued by owner of stock in mining company certifying that another was entitled to one-half the profits from the stock interest, justified trial court in investigating all surrounding facts to ascertain what was meant by the word "profits."

**2. Trusts ⇐112**

Where mining ventures were involved and entire purchase price of property and stock in mining company was paid for out of profits realized from a prior venture, the word "profits," as used in instrument issued by owner of stock in mining company certifying that another was entitled to one-half the profits from the stock interest, referred to stock itself, and not to dividends to be derived therefrom.

[Ed. Note.—For other definitions of "Profit," see Words & Phrases.]

**3. Witnesses ⇐167**

In action by wife of alleged partner in mining venture, who was deceased, against administrator of estate of wife of alleged copartner, brought after death of both alleged copartner and his wife, to impress a trust on stock in mining company and for an accounting, wife was not incompetent under statute to testify to matters or facts occurring prior to death of administrator's intestate. Code Civ.Proc. § 1880, subd. 3.

**4. Executors and administrators ⇐431(2)**

An action by wife of alleged partner in mining venture, who was deceased, against administrator of estate of wife of alleged copartner, brought after death of both alleged copartner and his wife, to impress a trust on stock in mining company and for an accounting, was not barred by wife's failure to file a claim in the estate of alleged copartner, since wife's claim was not to any part of estate, but one of ownership of stock.

**5. Executors and administrators ⇐437(3)**

The wife of alleged partner in mining venture, who was deceased, was not guilty of "laches" in failing to file claim of ownership in stock of mining company by virtue of trust agreement between her husband and his alleged copartner until after death of both alleged copartner and his wife, so that their testimony was not available in defense of claim, under the circumstances.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

**6. Estoppel ⇐63**

The wife of alleged partner in mining venture, who was deceased, was not "estopped" to claim ownership in stock of mining company by virtue of trust agreement between her husband and his alleged copartner, as against administrator of estate of wife of alleged copartner, after death of both alleged copartner and his wife, because neither agreement nor stock was listed as an asset of estate of claimant's husband until some time after decree of distribution, at which later time decree was entered distributing to the wife the asset as after-discovered property.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Jessie Beryl Porter against Harry G. Van Denburgh, as administrator of the estate of Emma Beatrice Clark, deceased, to impress a trust on certain personalty and for an accounting. From judgment for plaintiff, the defendant appeals.

Affirmed.

Oscar S. Elvrum, Girard F. Baker, and Robert Young, all of Los Angeles, for appellant.

Kelby, Lawson & Garroway, of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff filed an action to impress a trust on certain personal property and for an accounting. Judgment was rendered in her favor to the effect that she was the owner of and entitled to have issued to her, as successor in interest of her husband, L. E. Porter, 60,939½ shares of the capital stock of Tungsten Reef Mines Company. The defendant appealed.

The question for determination is whether the evidence supports the findings and the judgment. There is practically no conflict in the evidence. The controversy centers mainly on the interpretation of an instrument relied upon in part by the plaintiff as the basis of her cause of action. Briefly, the following facts appear:

In 1916, L. E. Porter obtained an option from W. P. Yaney on the purchase of 18 tungsten properties in Inyo county, California, for a price of $30,000. The properties were in two groups, known as the Noble group and the Aeroplane group. The purchase prices of the groups were designated as $7,000 and $23,000, respectively. The Noble group was resold by A. J. Clark for $60,000. Book accounts of Clark received in evidence disclosed that a division was effected between the two men of an amount representing the original purchase price of the claims and that a balance was reserved for investment in an account designated as the Standard Tungsten Account kept by Clark. The Aeroplane and other groups of claims were transferred to Standard Tungsten Company, Nevada corporation formed about the same time, and two certificates of its capital stock, representing 55,000 shares each, were issued in the name of A. J. Clark. Advances to the extent of $45,000 were made to that company from the Standard Tungsten Account. Advances also were made to the company by persons named Fraser and Abercrombie. A cash dividend of 7½ cents a share on the issued stock was paid to Clark and was divided equally with Porter. The record indicates that because of Porter's financial difficulties the ownership of the stock was retained in Clark's name.

The affairs of the Standard Tungsten Company did not progress satisfactorily, and its operations were discontinued. Its equipment was sold and its assets distributed. The amount realized was not sufficient to reimburse Fraser and Abercrombie fully for their investments after advances to the Standard Tungsten Account were repaid. Tungsten Reef Mines Company was then formed in June, 1918. Its entire capital stock consisting of 400,000 shares was issued in the name of Clark. The property of that company consisted of certain mining claims in Arizona, the option or down payment of which was paid for out of the Standard Tungsten Account. In 1921 the balance of the Fraser and Abercrombie obligations was satisfied by payment of cash and the transfer of a portion of the stock of the new company. A large portion of the stock of the company was held as treasury stock and sold to investors, until finally and at the time of Clark's death 121,879 shares only remained in his name.

In the meantime and on September 5, 1919, A. J. Clark signed and delivered to L. E. Porter an instrument in the following words: "This is to certify that L. E. Porter is entitled to one-half of the profits that come to me from my stock interest in the Tungsten Reef Mines Co., after all salaries, expenses of very kind have been paid, subject to any contract or agreements made by me prior to this date or any contract or agreements that I may hereafter make. It is understood and agreed that this agreement is not assignable."

L. E. Porter died in 1921 and Clark followed him in 1927. In June, 1934, Clark's widow passed away. The present action was brought in November, 1934, by the surviving widow of L. E. Porter against the administrator of the estate of Mrs. Clark.

The trial court found that Clark and Porter were copartners as to all of the foregoing transactions, and that Clark held the ownership of one-half of the shares

last referred to in trust for the use and benefit of Porter. It found that Clark executed and delivered the quoted instrument as evidence of such ownership and trust; that said agreement or understanding subsisted during their lifetimes, unchanged and unmodified, and that the plaintiff was the present owner thereof; that after Porter's death both Clark and Mrs. Clark recognized the plaintiff as the successor to her husband's interest and consulted and reported to her concerning the operation and management of the mining property and of the corporation; that all contracts and agreements to which said stock had been subjected had been discharged and that said stock was not subject to any contract or agreement except the claim of the plaintiff to the extent of one-half thereof. The court also found and concluded that the plaintiff was not guilty of laches in asserting her right to a one-half ownership of said stock. It entered judgment that the plaintiff was entitled to one-half of the shares.

[1, 2] On the appeal the defendant contends that, assuming she was entitled to something, the plaintiff was entitled only to "profits" from the stock and was not entitled to any of the stock itself. However, the ambiguity inherent in the word "profits", as used in the instrument relied upon by the plaintiff, justified the court in investigating all the surrounding facts and circumstances to ascertain what was meant by the word employed in the declaration signed by Clark. "Profits" and "Dividends" may be considered to have entirely different concepts in relation to stock shares where, as here, mining ventures are involved and the entire purchase price of the property and stock is paid for out of profits realized from a prior venture. In such case the resulting acquisition is still "profits" in the minds of the co-venturers. That "profits" in this case referred to the stock itself is still further borne out by the fact that the stock was subjected to contracts and agreements of Clark, as for instance to the agreement to reimburse Fraser and Abercrombie for their advances to the Standard company. The foregoing and other facts appearing in the record, together with the peculiar wording of the declaration itself, amply support the trial court's conclusion that the interest of Porter was in the stock itself, and not alone in dividends to be derived therefrom.

[3, 4] The defendant also contends that the plaintiff's cause of action was barred by her failure to file a claim in the estate of A. J. Clark, and that the testimony of the plaintiff relating to the transactions involved was incompetent under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure. These contentions are necessarily predicated upon the assumption that the plaintiff's right is based on a claim against the estate as distinguished from a claim to ownership of the stock. Since the claim is not to any part of the estate but one of ownership, it follows that the defendant's additional argument that the cause of action is barred by the statute of limitations and that the plaintiff was not a competent witness to testify to matters or facts occurring prior to the death of the defendant's intestate cannot be sustained. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Maguire v. Cunningham, 64 Cal.App. 536, 222 P. 838.

[5] The defendant's contention that the plaintiff was guilty of laches as a matter of law finds no support in the record. The defendant argues that the doctrine of estoppel by laches is applicable in this case because both Porter and Clark and the latter's widow are now dead and their testimony is not available in defense of the plaintiff's claim. But the book accounts and the testimony of a witness who was secretary and treasurer of the corporations while Clark was alive, and who kept the accounts, furnish independent credible evidence in support of the findings and judgment.

[6] There is likewise no merit in the contention that the plaintiff was estopped to claim ownership in the stock because neither the agreement nor the stock was listed as an asset of the estate of L. E. Porter until some time after the decree of distribution therein, at which later time a decree was entered distributing to the plaintiff the asset as after discovered property. The elements of estoppel are not present. The failure of the plaintiff until a later date to list the property as an asset of the estate was not a representation to the Clarks, nor was it any statement upon which they were entitled to rely. Furthermore, the evidence shows possession by them of a copy of the agreement and also their understanding of its terms.

The foregoing disposes of all of the defendant's contentions.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; GIBSON, J.; CARTER, J.; EDMONDS, J.




**BIGSBY v. JOHNSON, State Treasurer.** *

Sac. 5278.

Supreme Court of California.

Feb. 14, 1940.

Rehearing Granted March 14, 1940.

1. Licenses ⇐15(1)

A printer's furnishing of printed matter, mats, and composition, made from materials supplied by him, to customer for consideration, constitutes "sale of tangible personal property" within Retail Sales Tax Act, though printing operations involve performance of labor and services and composition and mats are acquired and employed merely in producing finished product. St. 1935, p. 1256, § 2(b).

2. Licenses ⇐15(1)

Printing on paper stock, furnished to printer by his customers, transfers title to and possession of new or fabricated article within provision of Retail Sales Tax Act defining "sale" as including "fabrication of tangible personal property for consumers who furnish * * * the materials used in the fabrication work." St.1935, p. 1256, § 2(b).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

3. Statutes ⇐121(7)

The Retail Sales Tax Act amendment, providing that "sale" includes fabrication of tangible personal property for consumers furnishing materials used in fabrication work, is covered by title of act as designed primarily to facilitate effective administration of sales tax, rather than to extend it to subject not expressed in title. St. 1935, p. 1256, § 2(b); Const. art. 4, § 24.

* For subsequent opinion, see 118 P.2d 289.

4. Statutes ⇐109

A title fairly expressing general subject of act covers all proper means and instrumentalities which will or may facilitate accomplishment or enforcement of purpose expressed. Const. art. 4, § 24.

5. Statutes ⇐109

Generally, title of act need not contain abstract or catalogue of entire contents thereof and statement of general purpose or object of act in title covers all matters germane to such purpose or object. Const. art. 4, § 24.

6. Licenses ⇐29

As furnishing of printed matter by printer to customer for consideration constitutes "sale of tangible personal property" within Retail Sales Tax Act, such tax applies to total amount charged for such matter, including charges for labor or services and materials, in view of definition of term "gross receipts" in act as meaning total amount of sale price. St.1935, p. 1256, § 2(f).

7. Licenses ⇐29

A seller's inability to collect sale price of personalty sold, such as printed matter furnished by printer to customer for consideration, does not relieve him from liability for tax on amount charged, in view of definition of "gross receipts" in Retail Sales Tax Act as total amount of sale price, including any amount for which credit is allowed by seller to purchaser. St.1935, p. 1256, § 2(f).

8. Constitutional law ⇐70(1)

It is judicial function to construe and apply legislation as enacted.

9. Licenses ⇐15(1)

A printer's sale of used melting pot and accessories previously used in his printing operations was made in course of his printing business, so as to render retail sales tax applicable to gross receipts from such sale. St.1935, p. 1253, § 3.

10. Licenses ⇐15(1)

The furnishing of printed papers by printer to newspaper publisher, which distributed them without charge for advertising purposes, was "retail sale" within Retail Sales Tax Act, as sale was not made for resale. St.1935, p. 1256, § 2(c).

11. Licenses ⇐15(1)

A newspaper publisher, furnishing newspapers to paying subscribers, is en-

gaged in "sale of tangible personal property," so that printer's sale of printed papers to such publisher for distribution to subscribers is "sale for resale" and gross receipts therefrom are not subject to retail sales tax. St.1935, p. 1256, § 2(c).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Carl M. Bigsby, doing business under the fictitious firm name and style of Compton Printing Company, against Charles G. Johnson, as State Treasurer, to recover the amount of retail sales taxes paid under protest. From a judgment for plaintiff on certain causes of action and for defendant as to other causes of action, both parties appeal.

Affirmed in part, and reversed in part.

Earl Warren, Atty.Gen., and H. H. Linney, and James J. Arditto, Deputy Attys. Gen., for defendant, respondent and appellant.

Roscoe R. Hess, of Los Angeles, for plaintiff, appellant and respondent.

Charles D. Thompson, of Hollywood, amicus curiae for Citizen-News.

GIBSON, Justice.

This appeal presents for our consideration the application of the retail sales tax to several phases of the printing business. In the complaint filed pursuant to section 31 of the Retail Sales Tax Act (Stats. 1933, p. 2599) and section 29 of the Use Tax Act (Stats. 1935, p. 1297) to recover taxes paid under protest, the plaintiff sets forth 21 causes of action. The defendant conceded that the plaintiff should prevail on causes of action numbered 4, 6 16, 19 and 21 inasmuch as the rulings of the state board of equalization, the tax administering agency, did not require the payment of a tax with respect to the transactions described therein. The plaintiff had judgment on the causes of action numbered 4, 6, 16, 17 and 19, but was denied judgment on the others. Plaintiff appeals on all causes of action on which the decision was adverse to him and defendant appeals on cause of action number 17. Apparently the trial court inadvertently failed to enter judgment for plaintiff on the cause of action number 21, the only one relating to the use tax, but defendant concedes herein, as he did in the lower court, that plaintiff should recover thereon and the judgment therein shall accordingly be reversed. Inasmuch as in many instances two or more of the remaining sixteen causes of action are governed by a single principle, we shall not attempt to discuss them separately, but shall rather point out the applicable principles and indicate the cause or causes of action governed by each principle.

The plaintiff operates a printing establishment, the operations of which include, so far as material to this action, the setting or composing of type, the making of papier-mache mats, the moulding of stereotype plates and the actual printing or presswork. His business transactions include, in addition to the ordinary printing order in which the printer furnishes the paper and ink and delivers the finished printed matter to his customer, the preparation of the necessary composition, mats and stereotype plates for use in connection with presswork on paper stock furnished by his customers and the furnishing to his customers of composition and mats. It is with the application of the retail sales tax to these transactions that this appeal is primarily concerned.

[1] *Furnishing of printed matter, mats and composition as a sale of tangible personal property.* The plaintiff contends that printing operations involve the performance of labor and services rather than the sale of tangible personal property and in support of that contention points to the fact that the value of the labor and services furnished by a printer in connection with a printing order may far exceed the value of the paper stock and ink which he furnishes. He states, for example, that the value of the materials furnished represents less than eight per cent of the total charge made in one of the transactions involved herein. In addition to this asserted factual basis for his position, plaintiff cites H. G. Adair Printing Co. v. Ames, 364 Ill. 342, 4 N.E.2d 481, and Washington Printing & Binding Co. v. State, 192 Wash. 448, 73 P.2d 1326, which undoubtedly support his contention. We believe, nevertheless, that the plaintiff's position is unsound.

Section 2 (b) of the Retail Sales Tax Act, as amended by St.1935, p. 1256, defines the term "sale" as "* * * any transfer of title or possession, or both * * * in any manner or by any means whatsoever, of tangible personal property, for a consideration * * *." The only

requirements for a sale of tangible personal property within the meaning of the act are, accordingly, (1) that there be a transfer of title or possession to tangible personal property and (2) that the transfer be made for a consideration. That printed matter is tangible personal property and that title and possession to such property is transferred by the printer to his customer for a consideration is clear. The amount charged for the printed matter, like the amount charged for all other articles of tangible personal property reflects manufacturing or production costs attributable to labor or other services.

Our rejection of the plaintiff's contention is supported by People ex rel. Walker Engraving Corporation v. Graves, 243 App. Div. 652, 276 N.Y.S. 674, affirmed, 268 N.Y. 648, 198 N.E. 539; People ex rel. Foremost Studio, Inc. v. Graves, 246 App. Div. 130, 284 N.Y.S. 906, and Cusick v. Commonwealth, 260 Ky. 204, 84 S.W.2d 14. In the Walker case, supra, the court upheld the application of the New York sales tax with respect to the sale of photoengravings and in doing so observed that [243 App.Div. 652, 276 N.Y.S. 675] "The value of the metal is not more than 2 per cent. of what the customer pays". In the Foremost Studio case, supra, the tax was upheld as applied to charges for the furnishing of designs which were then to be impressed on cloth by the customer, and in the Cusick case, last above cited, the Kentucky sales tax was upheld as applied to the charges of a photographic studio for photographs. The contention of the taxpayers in the latter case that their work consisted entirely of labor and that their business was one of personal service was answered by the court as follows: "In addition to the facts pleaded, we have the following argument: The cost of a picture portrait or drawing is not the paste board or canvas on which it is painted or drawn, but is the art, skill and talent of the artist. It is a creation of art made under contract for a particular party. It is not kept for sale, cannot be sold, and never becomes merchandise within the meaning of the act. Though the argument is strongly pressed, we are inclined to the view that photographs fall within the provisions of the law. * * * Coming to the argument that a photographer is engaged in selling service, and that service is not taxable, it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced, rather than the cost of materials out of which they are made. Moreover, the situation is not the same as if the patron took an article to another to be repaired and paid only for the service rendered. One who desires a photograph of himself or his family does not contract simply for service. He desires the finished article, and that is what he buys and what the photographer sells."

We, likewise, are of the opinion that when one places an order for printed matter he desires not merely service but the delivery to him of the finished product and that within the meaning of the Retail Sales Tax Act the printer is engaged in selling the printed matter to him. This is equally true of the composition and mats. Each is tangible personal property and title or possession is transferred by the printer to his customer for a consideration, thus satisfying the provisions of the act. The fact that the composition and mats are acquired and employed merely in the production of the finished product furnishes no basis for exemption. They form no part of the final product and are not, accordingly, purchased for resale. Their position is similar to that of the photoengravings involved in the Walker case and the designs in the Foremost Studio case. We are of the opinion, therefore, that the furnishing by a printer for a consideration of printed matter, mats, and composition, the materials used therein being supplied by the printer, constitutes a sale of tangible personal property within the meaning of the Retail Sales Tax Act.

[2] *Printing on paper stock furnished by customer as a fabrication and therefore a sale of tangible personal property within the meaning of the Retail Sales Tax Act.* As already indicated plaintiff's printing operations are at times carried on with paper stock furnished to him by his customers. While in such a transaction technically there is no transfer of title to tangible personal property, except a small amount of ink, there is a transfer of "title" and possession of the new or fabricated article, within the meaning of the act and the state therefore properly asserts a tax to be due with respect thereto in view of the following language which was added to section 2 (b) of the act by amendment in 1935: "'Sale' * * * includes the fabrication of tangible personal property for consumers who furnish either

directly or indirectly the materials used in the fabrication work * * *."

[3-5] Plaintiff does not contend that the production of printed matter through the use of the customer's paper stock does not involve a fabrication within the meaning of this section. He contends rather that such transactions are immune from the tax because the subject of the act in this respect, i. e., a tax on a fabrication, is not expressed in the title of the act as required by section 24 of article IV of the California Constitution, the title merely relating, so far as material herein, to a tax for the privilege of selling tangible personal property. In amplifying his argument plaintiff points to the impropriety of imposing a tax on labor or services under a title relating solely to sales of tangible personal property.

If the labor or service with respect to which the state seeks to impose the tax were wholly disassociated from sales of tangible personal property, it would, in our opinion, be doubtful whether their inclusion within the definition of the term "sale" without their mention in the title of the act constituted a compliance with the constitutional requirement. Such does not appear, however, to be the case. Instead of attempting by the 1935 amendment of section 2 (b) to make any general extension of the tax to charges for labor or services, it appears that the legislature was merely seeking to render ineffectual attempts to avoid the tax through the breaking down and separation of the various processes involved in the manufacture and production of tangible personal property. As the tax might have been avoided through the arrangement of business operations in such a way as to avoid a technical sale of tangible personal property, it was entirely logical for the legislature to block attempts at avoidance by defining the term "sale" in such a manner as to render ineffective any such arrangement as a method of tax avoidance. It appears, accordingly, that the 1935 amendment adding the fabrication provision to the definition of the term "sale" was designed primarily to facilitate the effective administration of the sales tax rather than to extend the tax to a subject not expressed in the title of the act. As so considered the case falls within the rule announced in Selowsky v. Superior Court, 180 Cal. 404, 411, 181 P. 652, 656, that a "title fairly expressing the general subject covers all proper means and instrumentalities which will or may facilitate the accomplishment or enforcement of the purpose expressed * * *." Other cases setting forth the general rule that the title of an act need not contain an abstract or catalogue of the entire contents of the act and that the statement in the title of a general purpose or object covers all matters germane to that purpose or object are People v. Superior Court, 10 Cal.2d 288, 297, 73 P.2d 1221; In re Lake, 89 Cal.App. 390, 395, 265 P. 325; and People v. Jordan, 172 Cal. 391, 394, 156 P. 451.

[6] *Gross receipts from a sale of tangible personal property. (a) Segregation of charges for labor and for materials.* Quite consistently with his position that charges for the furnishing of printed matter represent charges for labor or services the plaintiff has shown separately in the billings rendered to his customers his charges therefor and his charges for materials, and contends herein that the tax is not applicable to the charges for the labor and services. In addition, however, he claims that the tax is inapplicable to the amounts charged for the paper stock and ink, inasmuch as he is not engaged in the business of selling such property and only furnishes it as an incident to the performance of his services. Inasmuch as we have already determined that the plaintiff's operations involve the sale of tangible personal property rather than the performance of labor or services this contention of the plaintiff must be rejected.

The term "gross receipts" is defined in section 2 (f) of the Retail Sales Tax Act as follows: "'Gross receipts' means the total amount of the sale * * * price * * * of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever * * *."

As the furnishing of the printed matter constitutes a sale of tangible personal property, it necessarily follows that the tax applies to the total amount of the sales price, i. e., the total amount charged for the printed matter. The definition of

the term "gross receipts" clearly forbids the elimination from the measure of the tax of any labor or service costs. It is difficult to conceive any principle more essential to the effective administration of a sales tax measured by gross receipts than one absolutely precluding the breaking down of the sales price of property into amounts attributable to labor and to materials, to the end that the tax might be avoided as to the charges for labor. The manner in which the term "gross receipts" has been defined in section 2 (i) indicates that the legislature was fully aware of this problem and removed any possibility of a construction which might permit such a result.

It is impractical to designate particular causes of action as governed by any one of the three issues hereinabove discussed inasmuch as in the case of several causes of action, the decision is controlled by the determinations made of not one but of two of the issues. In accordance with the principles set forth above, the judgment for the defendant on causes of action numbered 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 14 and 20 must be affirmed.

[7] (b) *Deduction for bad debts.* In cause of action number 15 the plaintiff alleged that he was unable to collect the amount charged to a customer for the furnishing of certain printed matter, and contended that the tax was not applicable to the transaction. The contention is readily answered, for not only does the act define "gross receipts" as the total amount of the sale price, but it includes within the meaning of the term "any amount for which credit is allowed by the seller to the purchaser" and specifically forbids the deduction of "losses". The fact that a seller is unable to collect the sale price does not, accordingly, relieve him from including the sale in the measure of his tax and the judgment of the trial court in denying plaintiff judgment on his cause of action number 15 must therefore be affirmed.

[8, 9] *Sale of used printing equipment.* One of the transactions described in plaintiff's complaint involves the sale of a used Monomelt pot and accessories previously used by the plaintiff in his printing operations. He argues that he is not a used or second-hand machinery dealer, that the sale was purely incidental to his printing business, that the transaction was not entered into for profit and was not, accordingly, a sale made in the course of his business.

The Retail Sales Tax Act contains no provisions furnishing any basis for distinguishing between sales of new and used property and the state has proceeded upon the theory that the tax should be applied in the same manner with respect to retailers of both types of property. The problem here presented, however, is not merely whether the tax is applicable to sales of used property, a matter not questioned by the plaintiff, but whether a retailer of a particular type of tangible personal property is obligated to pay the tax with respect to sales of equipment which he theretofore used in the course of his business operations.

Section 3 of the act, as amended by St. 1935, p. 1253, in levying the tax provides as follows: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of * * * three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. * * *"

Our attention has not been directed to any other provision of the act which might have a bearing on the matter.

Section 3 certainly in no way specifically excludes the gross receipts from the sale of the used printing equipment from the measure of the tax and, on the other hand, provides for the application of the tax to the gross receipts of a retailer from "* * * the sale of *all* tangible personal property * * *." (Italics added.) It appears to us, accordingly, that to adopt the plaintiff's contention would require us not only to disregard the word, "all", but to read into the section an exception or exemption of property of a kind not ordinarily sold by a retailer or of the equipment of a retailer. This we are not prepared to do. It is the judicial function to construe and apply legislation as enacted.

The used equipment constituted an asset of the plaintiff's business and its sale was reflected in his property and income accounts. We are of the view, therefore, that the sale was made in the course of the plaintiff's business and that the tax applies to the gross receipts therefrom. The plaintiff's argument that such a holding would require the application of the tax with respect to an automobile "turned in" to a dealer in connection with the purchase of a

new car is unsound, inasmuch as the dealer acquires the used automobile for resale. His argument that the holding would permit the purchaser of an automobile to purchase it for resale in view of the fact that it would be "turned in" on the purchase of a new car at a later date is likewise unsound, for the automobile is purchased for use and not merely for subsequent resale. The judgment for the plaintiff on cause of action number 17 must therefore be reversed.

[10] *Sale of printed papers to newspaper publishers. (a) When the publisher distributes the newspapers without charge.* In some of the transactions described in the complaint the firm to which the plaintiff furnished printed matter was a newspaper publisher which either distributed the printed papers without charge, as in the case of advertising or so-called community newspapers, or which had a paid subscription list. No new problem is presented in the case of the furnishing of the printed papers to a publisher who distributed them without charge, for as we have already determined the furnishing of the papers constituted a sale of tangible personal property, and as the sale was not made for resale it was a retail sale within the meaning of section 2 (c) of the Retail Sales Tax Act.

[11] (b) *When the publisher has a paid subscription list.* In two cases, however, the newspaper publisher did not distribute the papers free of charge but rather had a paid subscription list and the papers were distributed by the publisher to his subscribers. The plaintiff advances the additional argument in these cases that the printed papers were acquired by the publisher for resale to his subscribers and that the tax would not, accordingly, apply to the printer's charges to the publisher therefor. The defendant contends, on the other hand, that the newspaper publisher is engaged in the performance of a service rather than in the sale of tangible personal property and that the sale of the papers to him is, therefore, a retail sale. It is said that the service, consisting of the gathering of news through correspondents throughout the world, the preparation of materials from those correspondents in a form suitable for publication and the dissemination of news to readers, is analogous to the service performed by a physician and is to be distinguished from the mechanical services of a printer which give rise to a sale of tangible personal property.

We are not inclined to dispute the contention that the character of the services performed by a newspaper publisher differs materially from those of the printer. Furthermore, we would not say that a physician is engaged in the sale of tangible personal property merely because he furnishes to his patient a prescription through the medium of certain written symbols on a piece of paper, which is undoubtedly tangible personal property. Nevertheless, we are of the opinion that the arguments advanced by defendant in support of his contention that the furnishing of printed matter constitutes a sale of tangible personal property within the meaning of the Retail Sales Tax Act and which induced us to uphold that contention, compel us to hold that the newspaper publisher in furnishing a newspaper to a paying subscriber is likewise engaged in the sale of tangible personal property. We can see no escape from the conclusion that the newspaper is tangible personal property and that the subscriber pays a consideration for the transfer to him of title to that tangible personal property.

It is undoubtedly true that the character of certain transactions is such that no sale within the meaning of the Retail Sales Tax Act occurs, even though title to tangible personal property passes from one person to another and the latter person makes a payment of a certain amount to the former. We have no hesitation in saying, for example, that a physician does not make a sale of tangible personal property when he furnishes a prescription to his patient. The activity of the physician is clearly the performance of a service even though certain tangible personal property may be furnished the patient in the performance of that service. The patient does not consult the physician to obtain a prescription and the physician's charge is not determined with reference to the furnishing of the prescription; in fact, it would probably be the same whether or not the prescription is furnished. It follows, then, that the physician's activity is the performance of a service and that he is paid for that service without regard to the furnishing of the prescription. In the case of the newspaper publisher, however, a charge is exacted for the furnishing of the newspaper and the subscriber pays a consideration for the delivery to him of the newspaper. The transfer of title aspect of the transaction outweighs, in our opinion, the service aspect which though admittedly of great im-

portance, is not necessarily more important than that involved in the painting of and subsequent transfer of title to a portrait or the publication and subsequent transfer of title to books and magazines. That the transfer of title to portraits, books and magazines for a consideration gives rise to a sale of tangible personal property has not, so far as we can ascertain, been questioned. We believe, accordingly, that a newspaper publisher is engaged in the business of selling tangible personal property to his subscribers and that the sale to him of the printed papers to be distributed to the subscribers is a sale for resale, the gross receipts from which are not subject to the tax. Judgment for the defendant on the causes of action 11 and 18 must, therefore, be reversed.

To recapitulate: The judgment for defendant on causes of action numbered 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 14, 15 and 20 are, and each is affirmed. The judgment for the defendant on causes of action numbered 11, 18 and 21 are, and each is, reversed. The judgment for plaintiff on cause of action numbered 17 is reversed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; SHENK, J.




15 Cal.2d 187

**KAMP v. JOHNSON, State Treasurer, et al.**

Sac. 5268.

Supreme Court of California.

Feb. 14, 1940.

**1. Licenses ⇐15(1)**

That optometrist's operations are regarded as practice of profession under State Optometry Act does not preclude possibility that operations may involve sales of tangible personalty within meaning of Retail Sales Tax Act, since the question is to be determined from the Sales Tax Act. St. 1913, § 1097; St.1933, p. 2599, as amended.

**2. Licenses ⇐15(1)**

The furnishing of glasses to patient by optometrist, sending prescription for lenses to supply house which fit lenses into frames selected by patient in optometrist's office from samples, was "sale of tangible personal property" within Retail Sales Tax Act, and optometrist was "retailer" within the act, and hence was subject to tax, notwithstanding that billing rendered patient did not separately show sales price of glasses, where cost of lenses and frames was considered in arriving at amount of lump sum charge, and sale to patient was not for resale. St.1933, p. 2599, as amended.

[Ed. Note.—For other definitions of "Retailer," see Words & Phrases.]

**3. Licenses ⇐15(1)**

Under Retail Sales Tax Act, tax must be paid at some time with respect to all tangible personal property sold for use or consumption and sale of which is not specifically exempted from tax, and the only question left for construction is the person to be regarded as retailer or as making retail sale of the tangible personal property. St.1933, p. 2599, as amended.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Harry M. Kamp against Charles G. Johnson, as treasurer of the state of California, and others, to recover tax paid under protest. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Herman Weinberger and Arthur L. Shannon, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputies Atty. Gen., for respondents.

GIBSON, Justice.

This action was instituted by the plaintiff pursuant to section 31 of the Retail Sales Tax Act of 1933 (St.1933, p. 2610), to recover tax paid under protest. Plaintiff appeals herein from the judgment entered for defendants by the trial court.

The plaintiff is engaged in the practice of optometry under the authority conferred by a registration certificate or license issued to him by the state board of optometry under the State Optometry Act (St.1913, p. 1097). He does not carry a stock of frames, lenses or other tangible personal property for sale at his office, but keeps there only an assortment of samples of frames from which his patient makes a selection. When his examination of the patient discloses the necessity of glasses,

he prepares a prescription for the lenses to be fitted into the type of frame selected, and the prescription is then sent to the supply house to be filled. After the glasses are completed they are returned to plaintiff who fits and adjusts them to his patient's eyes.

Plaintiff makes a lump sum charge to his patients, the form of his statement reading "For Professional Services Rendered". There is no itemization in the statement of separate charges for services, lenses, frames or fitting, although the cost of the lenses and frames is taken into consideration in arriving at the amount of the lump sum charge. The only question presented for our consideration is whether the retail sales tax applies to the portion of the charge which may be said to represent the fair retail value of the glasses furnished by the plaintiff to his patient.

The State Board of Equalization, the tax administering agency, regards an optometrist as a retailer of glasses furnished to his patients, its sales tax ruling number 37 reading as follows: "Oculists, opticians and optometrists must pay the tax on the receipts from the sales of glasses, frames, lenses and other items of tangible personal property sold by them. However, the tax does not apply to charges for eye examination and fitting glasses to a patient. If the charges made cover both glasses, frames, lenses and other items of tangible personal property and also charges for professional service, a segregation must be made and the tax paid on the fair retail value of the items of tangible personal property furnished."

The plaintiff denies that he is engaged in the business of selling tangible personal property, contending that he is engaged in the practice of a profession and that the furnishing of glasses to his patients is purely incidental to the rendering of professional service. In support of this position plaintiff cites Pennington v. Bonelli, 15 Cal.App.2d 316, 59 P.2d 448, wherein the court characterized the activities of optometrists under the State Optometry Act as the practice of a profession and not the conduct of a business; and Babcock v. Nudelman, 367 Ill. 626, 12 N.E.2d 635, wherein the Illinois supreme court ruled that an optometrist was not a retailer within the meaning of the Illinois Retailer's Occupation Tax Act (Smith-Hurd Stats. Ill. c. 120, § 440 et seq.), which is similar to our Retail Sales Tax Act (St.1933, p. 2599, as amended).

[1] The fact that plaintiff's operations are regarded as the practice of a profession under the State Optometry Act does not preclude the possibility that they may involve sales of tangible personal property within the meaning of the Retail Sales Tax Act for plaintiff's obligations for sales tax is to be determined through a consideration of the provisions of the latter act. Jameson Petroleum Company v. State, 11 Cal.App.2d 677, 680, 54 P.2d 776; County of Ventura v. Barry, 207 Cal. 189, 195, 277 P. 333; People v. Smith, 123 Cal. 70, 75, 55 P. 765. We must, accordingly, turn to the Retail Sales Tax Act to ascertain plaintiff's tax liability thereunder.

[2, 3] We have had occasion this day in our opinion in the case of Bigsby v. Johnson, Cal.Sup., 99 P.2d 268, to discuss at some length the factors which give rise to a sale of tangible personal property within the meaning of the Retail Sales Tax Act and a repetition here of that discussion is unnecessary. That there is a transfer of title to tangible personal property, the completed glasses, from the plaintiff to his patient cannot, of course, be denied. The evidence establishes that there is a consideration for that transfer for one of the elements entering into the calculation of the plaintiff's charge to his patient is the value of the tangible personal property furnished to the patient. The fact that the billing rendered to the customer does not show separately the sales price of the glasses is immaterial, for the form of the billing could in no way affect the essential character of the transaction if it was in fact a sale of tangible personal property within the meaning of the act. The manner in which the terms "retailer", "sale", and "business" are defined in the act compel, in our opinion, the conclusion that plaintiff makes a sale of tangible personal property within the meaning of the act when he furnishes glasses to his patient.

Our conclusion is supported by State Tax Commission v. Hopkins, 234 Ala. 556, 176 So. 210, wherein the court held that optometrists were retailers of tangible personal property within the purview of the Alabama Sales Tax Act. The decision of the Illinois supreme court in Babcock v. Nudelman, supra, is undoubtedly inconsistent with the view set forth herein. We have already, however, in the Bigsby case refused to follow the reasoning of the Illinois supreme court in its construction of the Illinois Retailer's Occupation Tax

Act. Our rejection of the construction given by that court finds additional support in its decision in American Optical Company v. Nudelman, 370 Ill. 627, 19 N.E.2d 582, wherein the court, despite its holding in the Babcock case that the tax was not applicable to the furnishing or sale of glasses by an optometrist to his patients, refused to apply the tax with respect to the sales of the supply house which filled the optometrist's prescription and thereby furnished lenses and frames to the optometrist. We do not believe that the legislature of this state intended so completely to relieve from the tax the sales of any tangible personal property not specifically exempted by the act. The broad definition of the term "retail sale" as "a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property * * *" (section 2, as amended) compels the conclusion that the tax must be paid at some time with respect to all tangible personal property sold for use or consumption and the sale of which is not specifically exempted from the tax and leaves for construction only the question as to the person to be regarded as the retailer or as making the retail sale of the tangible personal property. As we have already determined that the furnishing of the glasses by the plaintiff to his patient constitutes a sale of tangible personal property and as that sale is clearly not a sale for resale, it follows that the plaintiff is the retailer of the glasses within the meaning of the Retail Sales Tax Act. The judgment for defendants, should, therefore, be, and it is, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; SHENK, J.




15 Cal.2d 166

## In re BAXTER'S ESTATE.

## RICHARDSON et al. v. ROYAL INDEMNITY CO.

L. A. 17040.

Supreme Court of California.

Feb. 14, 1940.

Rehearing Denied March 14, 1940.

**1. Executors and administrators ⇐513(3)**

Where guardian of incompetent was appointed administrator of incompetent's estate and his final account in guardianship proceeding was subsequently approved and settled, but his final account as administrator was not approved prior to his death, the representative of administrator's estate upon submitting an "amended final account" was not entitled to attack collaterally the final account in the guardianship proceeding for purpose of establishing a debt due from administrator's estate to incompetent's estate by reason of defalcation in the guardian's accounts, and hence evidence in the form of inventories and accounts in the guardianship proceedings were properly rejected. Probate Code, § 932.

**2. Executors and administrators ⇐202(1)**

If recoverable loss was sustained by reason of any act of decedent while living, as guardian of incompetent, it was chargeable against him in that capacity and not in his capacity, subsequently acquired, of administrator of the incompetent's estate.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Anna Baxter, deceased, wherein Charles T. Chandler, administrator of the estate, filed his first and final account and report and a petition for distribution. The account and petition were stricken by stipulation, and it was agreed that an amended final account would be filed in the ordinary course. Thereafter Charles T. Chandler died, and F. L. Richardson was appointed administrator de bonis non of the estate of Anna Baxter, deceased. Subsequently R. F. Smith, who was appointed administrator of Chandler's estate, filed in the matter of the estate of Anna Baxter, deceased, an account designated "amended final account" of Chandler's administration of the Baxter estate. The Royal Indemnity Company, which was surety on the administrator's bond of Charles T. Chandler, filed objections to such "amended final account." From an order settling the account, Richardson, as administrator of the estate of Anna Baxter, deceased, Joseph W. Hale, as heir at law, and R. F. Smith, as administrator of Chandler's estate, appeal.

Affirmed.

For prior opinion, see 91 P.2d 962.

Wade Garfield and F. L. Richardson, both of San Diego, for appellants.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent.

SHENK, Justice.

This appeal is from an order settling the first and final account and report of the administrator of the decedent's estate. It is presented on a bill of exceptions.

On April 18, 1919, Charles T. Chandler was duly appointed the guardian of the estate of Anna Baxter, an incompetent person. On March 2, 1922, Anna Baxter died. Chandler was then, on May 8, 1922, duly appointed the administrator of her estate. In June, 1922, he filed his third and final account in the guardianship proceeding, showing a balance in his possession as guardian of $31,295.25. That account was approved and settled by the court in the same month, and Chandler was ordered to deliver all property in his hands as guardian of the incompetent to himself as administrator. As such administrator he filed an inventory in the decedent's estate showing the sum of $31,700.25 as the total appraised value of all property which had come into his possession. On May 11, 1925, Chandler as administrator filed his first and final account and report, and a petition for distribution. That account showed receipts of $32,279.81, and disbursements of $31,001.78, which included partial distribution to three surviving brothers of the decedent, Joseph W. Hale, Charles N. Hale and Thomas H. Hale, leaving a balance on hand of $1,278.03. At the hearing, pursuant to stipulation dated May 29, 1925, between the attorney for Chandler as administrator, and Clarence A. Henning, as administrator of the estate of the deceased Thomas H. Hale, said first and final account and petition for distribution was stricken from the calendar and it was agreed that an amended final account would be filed in the ordinary course. Thereupon the court ordered a reduction in the bond of the administrator from $30,000 to $2,000 upon the showing that less than the latter amount remained in the possession of the administrator and that no additional funds or estate were expected to come into his possession.

No further proceedings were taken in said estate until the filing of the amended final account hereinafter mentioned. On May 24, 1935, Charles T. Chandler died, and on June 12, 1937, F. L. Richardson was appointed administrator de bonis non of the estate of Anna Baxter, deceased. On September 10, 1937, R. F. Smith was appointed administrator of Chandler's estate. On March 5, 1938, Smith, assuming to act on behalf of the estate of Charles T. Chandler, filed in the matter of the estate of Anna Baxter, deceased, an account designated "Amended Final Account" of Chandler's administration of the Baxter estate. In that amended final account Smith alleged that Chandler as guardian of the estate of Anna Baxter, an incompetent person, had received funds or property in excess of the amount reported by Chandler as such guardian to the extent of $17,901.53, and that Chandler at the time of his death was therefore indebted to the estate of Anna Baxter, deceased, in said amount. Royal Indemnity Company, respondent herein, filed objections to said amended final account in the form of a denial of the allegations thereof. On the hearing of said account and the first and final account previously filed by Chandler which had been put off calendar, and the objections thereto, the court found receipts totaling $32,279.81, and disbursements pursuant to appropriate orders in the sum of $31,655.98. It concluded that Chandler, as administrator, was chargeable with the difference between those sums, or $623.83, with interest on a portion thereof compounded annually.

Richardson, as administrator of the estate of Anna Baxter, deceased, Joseph W. Hale, as heir at law, and R. F. Smith, as administrator of Chandler's estate, appealed from the order.

The ground of the appeal is that the court erred in not settling the final account of Chandler in accordance with the amended final account as filed by Smith.

The bill of exceptions shows that on the hearing herein the court declined to receive in evidence the original and supplemental inventories and the first and second annual accounts and reports of Chandler as guardian, and the ninth annual account of James R. Baxter who preceded Chandler as guardian of the incompetent; and that the court based its findings and order upon the third annual account of Chandler as guardian, the order settling the same, the first and final account of Chandler as administrator, and the testimony of F. L. Richardson that all vouchers showing the disbursement of the funds had been lost or destroyed.

It is the theory of the appellants that the offered evidence showed that certain moneys or securities came into the possession of Chandler as guardian which were not accounted for by him in the guardian-

ship proceeding, but which subsequently continued in his possession as administrator; and that the orders settling the accounts of the guardian as to such items as were claimed to have been unaccounted for or omitted were not final or conclusive herein. Reliance is placed upon Estate of Clary, 203 Cal. 335, 264 P. 242, and similar decisions and authorities to the effect that the settlement of accounts and reports is not conclusive as to any items which were not included in and actually passed upon by the court. It is contended that the items alleged in the amended final account filed by Smith were of that character, and that the Probate Court in this proceeding should have received the rejected evidence for the purpose of discovering such omitted items of property or money which had come into Chandler's possession as guardian and remained unaccounted for by him.

[1, 2] We conclude that the court's ruling was proper. If the amended final account, filed pursuant to section 932 of the Probate Code, and the evidence introduced or offered in support thereof, had indicated that certain moneys or property belonging to the Baxter estate were actually in the possession of the representative of Chandler's estate, the Probate Court would undoubtedly have had jurisdiction, notwithstanding the settlement of any prior account, to receive the report of the administrator to that effect, and to make any appropriate order of settlement and distribution. But such is not the import of the application in the present proceeding. The record does not show, nor do the appellants purport to claim, that Smith, as administrator of Chandler's estate and on behalf of that estate, is reporting as a fact that there is money or property in his possession in the amount alleged which belongs to the Baxter estate. On the contrary, the plain inference is that the representative of the estate of Chandler has no such property, but that the object in filing the amended final account is to establish by judicial decree in the administration proceeding a debt due from the estate of Chandler to the estate of Baxter resulting from a claimed omission or defalcation in the accounts of Chandler in the prior guardianship proceeding. That this is so appears from the following facts:

All of the appellants herein are represented by F. L. Richardson as attorney or in propria persona. F. L. Richardson also represented Chandler during his administrations as guardian and as administrator of the Baxter estate. He testified that he had a contingent fee contract of employment whereby Joseph W. Hale agreed to pay him a fee equal to fifty per cent of any money or property recovered for Hale from the Baxter estate. It therefore appears that parties whose interests normally would be opposed are shown united in a joint effort to establish such defalcation on the part of Chandler; and that the only opposing party and respondent herein is the surety on Chandler's bond. No evidence was produced or offered to indicate that Chandler at any time as administrator received any funds or property in addition to that accounted for by him as such administrator and as found by the court on the hearing herein. In that connection the appellants are content to rely upon inferences to be drawn from the accounts offered in evidence and filed by Chandler in the guardianship proceeding, and their contention that any unaccounted for funds or property received by him as guardian are presumed to continue in his possession in his new capacity as administrator. They point to the following apparent discrepancies appearing in the accounts offered in evidence and rejected by the Probate Court: The last account of James R. Baxter, filed in February, 1919, and approved by order of court on March 7, 1919, showed a balance of cash in banks belonging to the estate on the 15th day of November, 1918, in the sum of $47,265.33. The original inventory and first account of Chandler as guardian showed the receipt by him of $30,309.98, and no more, as "cash from the University Avenue Bank". In so far as the record shows, there is no explanation for the discrepancy in these two amounts. A supplemental inventory filed by Chandler in the guardianship proceeding showed the receipt of certain certificates of deposit issued by Baxter Bros. Bank in Iowa totaling in value the sum of $23,122.55, which by order of court were accepted in settlement of a claim against that bank. The first three certificates totaling $8,000 became due on or before March 1, 1922, and the balance between September 1, 1922, and September 1, 1924. The third annual account of Chandler as guardian filed on June 5, 1922, reported the amount of cash on hand as of June, 1921, taken from his second annual account, and in addition $11,512.11 subsequently received from all sources. The latter amount, it is admitted, includes $8,000 proceeds from the

certificates of deposit falling due prior to the filing of that account. The proceeds of the additional $15,000 plus of such certificates are reported by Chandler in his first and final administrator's account as constituting one of the items of property in the estate which had come to his possession, thus showing receipt by him as administrator of $14,672. cash in bank, $15,500.25 proceeds of certificates of deposit, and two further items which were the proceeds of notes and receipts from interest, making a total of $32,279.81. It is apparently the theory of the appellants that since Chandler reported at the outset the receipt of approximately $30,000 in "cash", and later received some $15,000 as proceeds from the certificates of deposit, he must have received a total of more than $45,000 instead of the reported sum in excess of $30,000. But, in so far as the present record is concerned, there is nothing to show that the $15,000 worth of certificates of deposit were not "cash", or a substitute for credits designated as "cash", and included in the $30,000 originally reported by Chandler as guardian. Therefore, had the court received all of the rejected evidence, and based its present findings thereon, we would not be able to say that its findings were not supported by the record including such rejected evidence.

However, the rule relied on by the appellants did not authorize the court in the present proceeding to investigate the accounts filed by Chandler in the prior guardianship proceeding, approved and settled by an order of the court which has since become final. The appellants may not invoke the jurisdiction of the Probate Court herein for the purpose of establishing a debt due to the Baxter estate from the estate of Chandler, in effect a money judgment, by virtue of some alleged act committed by Chandler in a different capacity. In so far as the present proceeding is concerned the purported attack upon the accounts of Chandler as guardian must be deemed to be collateral, and under familiar principles the order approving and settling such accounts in the prior guardianship proceeding are final and conclusive herein. Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; Estate of McGue, 180 Cal. 413, 181 P. 637; Estate of Madsen, 31 Cal.App.2d 240, 87 P.2d 903; 11a Cal.Jur., p. 180, and cases cited. The rule relied on and stated in the Clary case was applied there in the same and not in a subsequent proceeding. What application it may have in an appropriate proceeding to reopen the guardianship matter or in a court of equity is not a question with which we are here concerned. Furthermore, if a recoverable loss was sustained by reason of any act of Chandler as guardian, it was chargeable against him "in what was then his true character", and not in his capacity as administrator. 24 Cor.Jur., p. 52, sec. 470.

There is no merit in the contention that the court should have allowed interest on the whole of the amount found to be due from Chandler as administrator.

The order is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; CARTER, J.; GIBSON, J.; EDMONDS, J.




37 Cal.App.2d 224

**KIRK et al. v. JOHNSON, State Treasurer.**

**Civ. 6229.**

District Court of Appeal, Third District, California.

Feb. 8, 1940.

Hearing Denied April 8, 1940.

**1. Appeal and error ⇐989**

In action for amount of retail sales taxes paid under protest, character of plaintiffs' businesses was fact question, and only question on appeal from judgment for defendant is whether there was substantial evidence supporting trial court's findings that plaintiffs were engaged in retailing tangible personalty, that they did not sell cattle for mere purpose of resale by purchasers for human consumption, and that taxes were lawfully levied and collected. Gen.Laws 1937, Act 8493, §§ 2(c), 5(e).

**2. Licenses ⇐19(3)**

The provision of Retail Sales Tax Act, exempting gross receipts from sale of food products, including milk, milk products, meat and meat products, for human consumption, does not exempt proceeds from sales of cattle which produce milk and meat. Gen.Laws 1937, Act 8493, § 5(e).

**3. Licenses ⇐15(1)**

Cows, bought for primary purpose of using them in dairy business to produce milk for market, are not purchased for "resale in the form of tangible personal property" merely because buyer intends to market them as beef when their usefulness as milk producers ceases, so that sales thereof for such primary purpose are not exempt from retail sales taxes. Gen.Laws 1937, Act 8493, § 2(c).

**4. Licenses ⇐19(3)**

Sales of cattle are not exempt from retail sales taxes merely because they produce milk or may finally be converted into beef, as it must be assumed from failure to mention cattle in clause of statute exempting such by-products from such taxes that Legislature did not intend to exempt live animals. Gen.Laws 1937, Act 8493, § 5(e).

**5. Licenses ⇐19(3)**

Cows purchased for purpose of carrying on dairy business are not sold for human consumption within provision of Retail Sales Tax Act exempting gross receipts from "sale of food products for human consumption" from such taxes, though they may be devoted thereto after later sale thereof by purchaser. Gen.Laws 1937, Act 8493, § 5(e).

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by E. I. Kirk and others against Charles G. Johnson, as State Treasurer, to recover the amount of retail sales taxes paid by plaintiffs under protest. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Thomas V. Cassidy, of Huntington Park, for appellants.

Earl Warren, Atty. Gen., and James J. Arditto, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs, who are engaged in the business of buying and selling dairy cows in Los Angeles county, have appealed from a judgment rendered against them in a suit to recover retail sales taxes which were paid under protest. The case was tried in Sacramento county. The court determined that the plaintiffs were engaged in selling to consumers tangible personal property which subjected them to the payment of excise taxes under the California Retail Sales Tax Act. Stats.1933, p. 2599, Deering's Gen.Laws, 1933, p. 2360, Act 8493, and amendments of 1935, p. 1256, Deering's Gen.Laws, 1937, p. 3892. Judgment was rendered to the effect that plaintiffs take nothing by their action.

It is contended by the appellants that the findings and judgment are not supported by the evidence for the reason that the cattle were sold to persons for the purpose of "resale" only, and because they constituted "food products for human consumption" as that term is defined in section 5 (e) of the act. It is asserted the sales of cattle involved in this suit are specifically exempt from taxes under both sections 2 (c) and 5(e) of the act, and that the collections of the taxes were therefore illegally enforced.

[1] Under the circumstances of this case, the question regarding the character of the businesses is one of fact. National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 287, 79 P.2d 380. The court found that each of the plaintiffs was engaged in retailing tangible personal property, and upon the contrary that they did not transfer title to the cattle for the mere purpose of resale by the purchasers for human consumption. The court further found that the retail sales taxes were lawfully levied and collected pursuant to the provisions of the California Retail Sales Tax Act. The only question for us to determine is whether there is substantial evidence to support those findings.

[2] The findings and judgment are amply supported by the evidence. Section 2 (c) of the act defines a "retail sale" or a "sale at retail" as a sale of any tangible personal property "to a consumer or to any person for any purpose other than for resale in the form of tangible personal property". Section 5 of the act provides in part:

"There are hereby specifically exempted from the provisions of this act and from the compensation of the amount of tax levied, assessed or payable under this act the following:

* * * * * *

"(e) The gross receipts from the sale of food products for human consumption. 'Food products' as used herein includes cereals and cereal products, milk and milk

products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. 'Food products' does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith, nor does the term 'food products' include the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property."

It is argued by the appellants that the cows in question were neither sold to the purchasers as "consumers" nor were they to be used by them solely for dairy purposes, but, on the contrary, that they were transferred for the chief purpose of resales to butchers for beef after they had been fattened. It is further asserted that the milk which was produced and sold during the process of fattening constituted "milk products", and that the beef came within the definition of "meat products", which by-products, together with the cattle which produced them, are exempted from the application of the act as provided by section 5(e) thereof.

Neither the meat nor the milk was taxed. The sales of cattle, which produced the milk and the meat, are not to be confused with the by-products which are specifically exempted from taxation. The act does not exempt the cattle.

[3] The plaintiffs are cattle dealers. They purchased cows and sold them to various dairymen in Los Angeles county. The dairymen bought cows in their prime to be used chiefly for the milk which they produced. The cattle belonged to the breeds which are commonly known to produce the largest quantity and the best quality of milk. Most of them were the Holstein, Guernsey or Jersey strain of dairy cows. They were actually used by the purchasers for an average period of about two years and three months before they became unprofitable as milk cows. They were kept in corrals and intensively fed with the express purpose of producing the largest possible quantity and the highest quality of milk for the market. Dairy cows are valued in proportion to the number of pounds of milk they produce daily and the richness of the butter-fat which it contains. Sometimes they are sold with a guaranty of producing a specified number of pounds of milk per day, and they are paid for accordingly. Under ordinary conditions a dairy cow is in its prime and produces the maximum quantity of milk between the ages of six and nine years, although some cows continue to remain profitable milkers to an age of ten or twelve years. When dairy cows become unprofitable because the cost of their feeding and care exceeds the proceeds derived from the sale of their milk, the cows are then usually fattened by feeding concentrates containing a high degree of protein, and then sold to slaughter houses to be butchered and resold as meat and meat products. The record contains evidence that the aggregate value of the milk which a dairy cow produces is nearly double the amount which it brings when it is finally sold to be slaughtered and used as beef; that a typical beef animal is worth more money on the market for the purpose of meat than is a dairy cow which has been milked through its prime years; that the latter produces meat which is coarser grained and not so tender as the flesh of a typical beef animal, and that the dairy cow is therefore worth less money than the average beef animal, when marketed as meat. There is evidence that the sale of dairy cows, when their usefulness as milkers has ceased is only secondary and incidental to the chief purpose for which they are originally purchased, which is to derive profit from the sale of milk which they produce.

The affidavits of several purchasers of cattle were received in evidence. They uniformly aver that they bought dairy cows with the double purpose of using them in their dairy businesses so long as they remained profitable milkers, and that they then fattened and sold them to the butchers for beef. It was stipulated by the appellant that all dairymen purchase and replenish their herds with that double purpose in view. It also appears that the small percentage of dairy cows which die from diseases are sold to rendering plants.

We are of the opinion dairy cows which are bought for the primary purpose of first using them in a dairy business to produce milk for the market during the period of

their usefulness for that purpose, which continues for an average of over two years' time, may not be said to have been purchased for "resale in the form of tangible personal property", merely because the owner intends to market them as beef, when their usefulness for the original purpose for which they were acquired has ceased. Under the circumstances of this case the dairy cattle were not bought "for resale". It is apparent that the chief purpose for which they were purchased was not for resale, but they were to be used for the benefit of the owners in conducting their dairy businesses as long as they were profitable for that purpose. The purchases of cattle in this case do not come within the exception to the Retail Sales Tax Act found in section 2(c) thereof, and the sales are therefore not exempt from taxes on that account.

[4] Nor are the sales of cattle exempt from taxation under the provisions of section 5(e) of the act, merely because they produce milk or for the reason that they may finally be converted into beef, which by-products are excepted from taxable sales. It is the sale of milk and not the source from which it is produced that is exempt; just as it is the sale of "eggs and egg products" and not the hens that lay the eggs which are exempt from taxes. The exemption clause does not mention cattle or chickens. We must assume, from the failure to do so, that the legislature intended to exempt from taxation only the by-products of cattle and poultry, and not the live animals or birds.

[5] It is true that the first clause of section 5(e) exempts "The gross receipts from the sale of food products for human consumption". But a cow which is purchased for the purpose of carrying on a dairy business is not sold for human consumption, although it may be devoted to that purpose after a later sale is consummated. Nor is a flock of chickens which are purchased for the purpose of conducting the business of producing eggs sold for human consumption, although they may later follow the destiny of fricasseed fowl. The essential question to be determined is whether they were sold with the intention that they were then to be used for human consumption. Of course a cow or a chicken which is sold, not to be used in conducting a business, but for human consumption, is exempt from taxation. But they are not exempt merely because, after a series of sales, they may eventually be used for food for human beings. It is not disputed that animals and poultry which are sold for the express purpose of propagation are subject to sales taxes, although they may be eventually used for human consumption. Nor are they exempt when they are used to conduct a business. The meaning of the term "food products" as it is used in that exemption clause is specifically defined. It includes merely "milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products", etc. It is significant that neither cattle nor poultry are mentioned in the exemption clause. It is the sales of by-products and not the live animals or poultry which are exempted from taxation.

The attorney general forcefully states the same conclusion regarding the application of that exclusion clause, as follows:

"The appellants were selling 'dairy cows' and not food products. Appellants' contention, carried to its extreme, would lead to the conclusion that when a dairy cow was sold a sale was made of leather, gelatin, moving picture film, fertilizer, milk, meat, glue, etc.

"We submit that once a sale is made of leather, fertilizer, meat and glue, etc., the cow is no longer in existence and vice versa when a cow is sold there is no sale of its many by-products", which come into existence only after it is slaughtered.

The findings and judgment are adequately supported by the evidence. The sales of dairy cattle in the present case were not exempt from taxation. The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

37 Cal.App.2d 230

**HINSHAW et al. v. HOPKINS.**

**Civ. 6322.**

District Court of Appeal, Third District, California.

Feb. 8, 1940.

**1. Deeds ⇐54, 56(2)**

It is essential to validity of transfer of realty that there be delivery of conveyance with intent to transfer title.

**2. Appeal and error ⇐1008(1)**

As respects delivery of deed, grantor's intention to transfer title is question of fact to be determined by trial court from consideration of all evidence in case bearing on question.

**3. Deeds ⇐208(4)**

Evidence warranted finding that deed of home property executed by grantor to housekeeper prior to grantor's death and recorded after grantor's death by grantor's attorney, in whose hands grantor left deed, was valid, on ground that grantor who realized that she did not have long to live and who wished her housekeeper to have the home property, and who thereafter executed will disposing of all her property except the home property, delivered deed without intending to reserve any power to recall or modify the deed.

**4. Deeds ⇐200**

Declarations of grantor made before signing of deed, showing her intention to deed property to grantee, and grantor's declarations made after signing of deed, showing that grantor had made deed and had given property to grantee, were admissible on question of delivery of deed.

**5. Deeds ⇐200**

Where the thing in issue is whether or not grantor has parted with title, grantor's declarations made prior to, at time of, and subsequent to, making of deed are admissible.

**6. Trial ⇐139(1), 140(1)**

Trial court must weigh evidence and determine credibility of witnesses.

**7. Appeal and error ⇐1011(1)**

An appellate court will not disturb findings of trial court where there is substantial conflict in evidence on material points, and where there is some evidence to support the findings.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action to set aside deed and to quiet title by Floyd M. Hinshaw and Helen M. DeGroot as executor and executrix of the will of Alice L. Dornberger, deceased, and another, against Mabel A. Hopkins. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Alfred E. Cate, of Los Angeles, for appellants.

H. Sidney Laughlin, of Los Angeles, for respondent.

SCHOTTKY, Justice pro tem., delivered the opinion of the court.

This action was commenced by Floyd M. Hinshaw and Helen M. DeGroot, as executors of the will of Alice L. Dornberger, deceased, and Helen M. DeGroot, as an individual, against Mabel A. Hopkins, to set aside and declare void a deed from said deceased to said Mabel A. Hopkins, and to quiet title to the property described therein.

According to the complaint, Alice L. Dornberger employed Floyd M. Hinshaw, a notary public, to prepare a deed of the real property here in dispute, to be executed by herself in favor of Mabel A. Hopkins, and that thereafter said Floyd M. Hinshaw prepared the deed, and on or about the 29th day of June, 1935, the deed was executed by Alice L. Dornberger. The complaint further alleged that at the time of the execution of said deed, the said Alice L. Dornberger was suffering with malignant cancer, and told the said Floyd M. Hinshaw that she did not expect to live, and that she desired to deed the said real property to Mabel A. Hopkins in the event she died, but in the event she got well she wanted the real property for herself; that at the request of Alice L. Dornberger, Hinshaw took her acknowledgment, whereupon she immediately handed the deed to Hinshaw, instructing him to keep the deed, and in the event of her death to record it, but in the event she got well to return it to her, so that she might destroy the same. The complaint further alleged that said Floyd M. Hinshaw thereupon took the deed into his possession and kept the same in his possession until the day after the death of the said Alice L. Dornberger, when he recorded the deed in the office of the county

recorder. The complaint further alleged that the deed was void for the reason that it was not unconditionally delivered to the grantee during the lifetime of said Alice L. Dornberger, and for the further reason that said deed was testamentary in character.

The answer of defendant denied that the said deceased Alice L. Dornberger had at any time informed Floyd M. Hinshaw that in the event that she got well that he was to return the deed to her so that she might destroy the same, and alleged that said Alice L. Dornberger had instructed said Floyd M. Hinshaw to draw a deed by which she, as grantor, would convey to defendant, as grantee, the real property in question, and further instructed said Hinshaw that he was to hold the deed during her lifetime, and at her death to immediately deliver the same to defendant, or record the same for the defendant.

It appears from the evidence that Mrs. Alice L. Dornberger was a woman past middle age, and was living upon the property here in dispute. She was divorced and lived alone. She had a grown married daughter and two grandchildren. The respondent, Mabel A. Hopkins, for almost nine years before the commencement of the action, had been employed as a housekeeper by deceased, and lived with her husband, Frank Hopkins, in a small house in the rear of the same property. About seven years prior to her death, Mrs. Dornberger had undergone an operation for cancer, and about six months prior to her death she became ill and consulted a physician, who informed her that she had cancer and would probably not live more than six months. She consulted a number of physicians thereafter, and underwent treatment of various kinds up to the time of death.

It appears that Mrs. Hopkins, the respondent, had performed many services for Mrs. Dornberger and Mrs. Dornberger felt very kindly towards her, and that after Mrs. Dornberger had been told by her physician that she would probably not live more than six months she told a number of people, including Mrs. Nellie Hinshaw, the wife of Floyd M. Hinshaw, that she was going to deed the home property to Mrs. Hopkins. About June 24 or 25, 1935, Mrs. Dornberger was at the home of Mr. and Mrs. Floyd Hinshaw, where she visited frequently and with whom her relations were very friendly, and requested Mr. Hinshaw, who was an attorney at law, as well as a notary public, to prepare a deed of the property in litigation to Mrs. Hopkins. No one else was present at said conversation, as Mrs. Hinshaw was in the kitchen preparing the evening meal, to which Mrs. Dornberger was invited. The testimony of Floyd M. Hinshaw as to what was said by Mrs. Dornberger is as follows:

"After general discussion Mrs. Dornberger said to me, 'Floyd, I wish you would prepare a deed covering the property in which I live. I want to deed that to Mabel Hopkins.' * * *

"I then said, 'Alice, this is not the proper way to give Mrs. Hopkins this property. You should do it by will.'

"Mrs. Dornberger replied, as nearly as I can remember her language, that it was her desire that Mrs. Hopkins have possession of the property upon her death, and that the delay which would be brought about by the probating of the will, and that also she wanted to save Mrs. Hopkins inheritance tax fees on the property; so she said, 'I want to do it by deed.'

"So I told her I would prepare the deed and let her know when it was ready for her signature. She said, 'Now, this deed is to be retained by you until after my death; on my death I want you to record it. But,' she says, 'in the event I get well I want you to return the deed in order that I may destroy it.' She said, 'You know that the doctors have told me that I haven't much longer to live, and that I better put my house in order,' I believe was the way she put it 'but', she said, 'I think I am going to get well, so I want you to retain possession of the deed at all times until after I have passed away.'

"The deed was prepared at that time, and a day or so afterwards I called Mrs. Dornberger on the phone and told her the deed was ready for her to sign, and she said well, she wasn't feeling very well, and that we would let the matter rest until I heard from her again.

"On the afternoon of June 29, 1935, Mrs. Dornberger telephoned me, asking me if the deed was ready. I told her that it was. She asked me if I would drive by her home that evening and bring the deed with me in order that she might sign it. So I drove by her home that evening, arriving at her home at 3969 South Budlong Avenue about 5:30, and went in and gave her the deed to read. There was no one present

but she and I, and she read the deed and signed it, and asked me as a Notary Public to acknowledge her signature; and then after signing the deed Mrs. Dornberger handed it back to me. 'Now,' she said, 'Floyd, I wish you would take this deed and put it in your safe deposit box or your safe, or some place where it will be in safe keeping. And under no circumstances would I want you to lose possession of this deed, because if I get well I want it returned to me in order that I may destroy the deed.'

"So I acknowledged the deed and placed it in the safe in my office where it remained until the day after Mrs. Dornberger's death.

"Mrs. Dornberger died on September 19th last. At about 3:00 o'clock in the afternoon of September 20th I was coming to the City Hall on another matter, and I took the deed out of the safe and brought it to the office of the County Recorder and recorded the deed, having placed on the back of the deed the name of Mabel A. Hopkins, 3969 South Budlong Avenue, Los Angeles, California, as being the person to mail the instrument to upon recordation."

As already stated, Floyd M. Hinshaw was the only witness as to what was said by Mrs. Dornberger at the time she gave him instructions to prepare the deed, and also at the time she executed and acknowledged the deed and delivered it to him for safekeeping.

Respondent called six witnesses, all of whom were close friends of Mrs. Dornberger, and a fair summary of the testimony of these witnesses is that beginning about the month of April when she left Doctor Schwuchow's office, Mrs. Dornberger told them that she realized she did not have long to live, and that she wanted Mrs. Hopkins to have her home property, and was going to deed it to her. After the execution of the deed she told several of the witnesses that she had deeded the property to Mabel Hopkins and that it would be Mrs. Hopkins upon her death.

On September 3, 1935, at the request of Mrs. Dornberger, Floyd M. Hinshaw, prepared her will, which was signed by her on that date. In that will no mention was made of the real property described in the deed to respondent, although Mrs. Dornberger specifically devised her only other parcel of real property to her daughter, Mrs. DeGroot, and her two grandchildren, and bequeathed to Mabel A. Hopkins, respondent, all furniture located in the home at 3969 South Budlong avenue, not otherwise disposed of by the will. Floyd Hinshaw testified that at the time the will was prepared there was no discussion about the Budlong avenue property, even though there was no residuary clause in the will. The will named appellants, Floyd M. Hinshaw and Helen M. DeGroot, coexecutors.

Mrs. Dornberger died on September 19, 1935, and the deed was recorded by Hinshaw on September 20, 1935. Respondent testified that she phoned Hinshaw on September 20, 1935, and asked him if he had recorded the deed, and that Hinshaw told her, "I have just come in from having recorded it. Now, Mabel, you have the same equity in that property that Alice had." Hinshaw denied that respondent phoned him, but Mrs. Hinshaw testified that respondent phoned her on the 20th asking her to have Mr. Hinshaw keep his promise to record the deed, and that she phoned Mr. Hinshaw and told him of respondent's call, and that about 3 p. m. he phoned her and told her he had recorded the deed and that she then phoned respondent and told her the deed had been recorded.

The inventory and appraisement in the estate of Alice Dornberger was introduced in evidence. The affidavit that it contained a true statement of all the assets of the estate was sworn to by appellant Helen M. DeGroot, executrix, before appellant Floyd M. Hinshaw as notary public on November 30, 1935, and the Budlong avenue property described in the deed was not listed among the assets of the estate, said estate being appraised at more than forty-eight thousand dollars. The household furniture of deceased, which was located in the home of deceased, and which was bequeathed by the will to respondent was listed in the inventory, and was appraised at $850.

The trial court found in brief that on or about June 24, 1935, Alice L. Dornberger employed Floyd M. Hinshaw, a notary public, to prepare a deed of her home property to Mabel A. Hopkins, a married woman, which deed was prepared by said Floyd M. Hinshaw and presented to Alice L. Dornberger on June 29, 1935, for signature and was executed by her on said date; that on said 24th and 29th days of June, 1935, the said Floyd M. Hinshaw was a duly licensed and practicing attorney

in the state of California and the attorney for the said Alice L. Dornberger.

The court further found that at the time of the execution of said deed Alice L. Dornberger was suffering from malignant cancer and on several occasions and prior to and subsequent to June 29, 1935, was informed by her physicians that she was afflicted with a malignant cancer of the lung involving the heart and could not recover; and she knew from April, 1935, that she was afflicted with a malignant cancer of the lung and could not recover and that the extreme duration of her life was not over six months.

The court also found that the deed was not void for the reason that said deed was not unconditionally delivered to the grantee during the lifetime of said Alice L. Dornberger or that said deed is testamentary in character, and also that the document was delivered with the intention to divest herself of the fee title to said property and to release all control and domination over said property and that it was not her intention to reserve unto herself any power to recall or modify said deed but it was her intention to and she did reserve only a life estate in and to said property.

In accordance with these findings, the trial court ordered judgment in favor of the defendant and against the plaintiffs, and that the defendant Mabel A. Hopkins was the absolute owner of the fee of said real property, free and clear of any right, title or interest of the plaintiffs in said action.

Judgment was accordingly entered and this appeal is from said judgment.

Appellants devote some fifty pages of their opening brief to pointing out what they claim to be contradictions and inconsistencies in the testimony of defendant's witnesses, and then make the following statement:

"The sole question for determination by this Court is whether there is testimony that is fairly and reasonably deducible from the evidence that supports the finding that the delivery of the deed was unconditional.

"Mr. Hinshaw was the only person besides the decedent who was present at the time of the delivery of the deed, and he says the delivery of the deed to him was expressly subject to recall. His testimony was unimpeached.

"The only possible contradiction to his testimony would be by inferences drawn by the Court from declarations of the grantor, her physical and mental condition, and her actions around and about the time of the execution of the deed."

It would appear at the outset that the chief question involved upon this appeal is whether or not there was a delivery of the deed in question sufficient to pass title to respondent upon the recordation of the deed after the death of Alice L. Dornberger. Respondent contends that the grantor intended to, and did, upon the delivery of the deed in question to Hinshaw, part with all dominion over the deed and all power to recall it, and that such delivery to Hinshaw was a valid present delivery to respondent Mabel A. Hopkins.

[1, 2] It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title. The solution of this question is grounded entirely on the intention of the grantor, and this is a question of fact to be determined by the trial court from a consideration of all the evidence in the case bearing upon the question.

In Moore v. Trott, 162 Cal. 268, 122 P. 462, 465, the court said: "It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another. 'The delivery,' says Touchstone, 'is either actual, i. e., by doing something and saying nothing; or else verbal, i. e., by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed.' 1 Shep. Touch. 57. This principle is recognized and expressed in all the cases. * * *"

In the case at bar the court below found that it was the intention of Alice L. Dornberger to deliver, and that she did deliver, a deed of the property to respondent, and that it was her intention to divest herself of all control and dominion over said property, and that it was not her intention to reserve unto herself any power to recall or modify said deed, but to reserve only to herself a life estate in said property.

Appellants contend that there was no evidence sufficient to overcome what appel-

lants claim was the definite, unimpeached testimony of Floyd M. Hinshaw that the delivery was conditional.

The question then presents itself as to how far the testimony of Floyd M. Hinshaw that the delivery of the deed was conditional was binding upon the trial court. In view of the fact that Hinshaw was the only witness who could testify as to the instructions given him by Mrs. Dornberger when he received the deed into his possession, was the court below justified in finding contrary to his testimony?

One of the leading cases in California upon this point is the case of Davis v. Judson, 159 Cal. 121, at pages 128, 130, 113 P. 147, at page 150 where the court said:

"It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right arbitrarily to reject it and find to the contrary.

"While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy. * * *

"So that, within the rule as we have stated, while the trial court had the statement of Wilson that he was sure that he had obtained a deed from the trustees, and although there was no direct testimony impeaching him or contradicting his statement, still the conduct of Wilson, as disclosed by his other testimony and the other circumstances in evidence, were such that the court had a right to conclude that it was inconsistent with the execution of any conveyance to Wilson, and warranted the rejecting as improbable his statement that such a conveyance had been made. Blankman v. Vallejo, 15 Cal. [638], 645; Baker v. Fireman's Fund Ins. Co., 79 Cal. [34], 41, 21 P. 357; Chico Bridge Co. v. Sacramento Transp. Co., 123 Cal. [178], 184, 55 P. 780."

To the same effect see: Blanc v. Connor, 167 Cal. 719, 722, 141 P. 217; Cox v. Schnerr, 172 Cal. 371, 379, 156 P. 509; Belser v. American Trust Co., 125 Cal.App. 344, 347, 13 P.2d 951; Davis v. Judson, 159 Cal. 121, 113 P. 147.

In the case of Whitaker v. Whitaker, 137 Cal.App. 396, at page 401, 30 P.2d 538, at page 540, the court said: "The rule that the uncontradicted testimony of a witness cannot be disregarded is subject to the limitation that the trial court or jury may discard such testimony when the surrounding circumstances of the case afford probable justification for such action."

[3] Applying the test of these authorities to the testimony of appellant, Floyd M. Hinshaw, we believe that it cannot be said that "there are no matters or circumstances which at all impair its accuracy".

Hinshaw testified that at the time Mrs. Dornberger requested him to make the deed, he told her not to make the deed, but to provide for respondent by will. He further testified that when he received the deed from Mrs. Dornberger he placed it in an envelope, and put it in his safe; that the only notation or memorandum he made was to write on the envelope "Alice L. Dornberger, Deed", and to place with the deed a memorandum "To be recorded upon the death of Alice L. Dornberger." He further testified that he drew Mrs. Dornberger's will on September 3, 1935, and that although he believed the deed previously made was invalid, he made no reference to it when the will was drawn, and no mention of her home property was made in the will, although the only other parcel of real property that Alice L. Dornberger owned was specifically devised, and although the furniture in the home property was specifically bequeathed to respondent. He further testified that the day after the death of Alice L. Dornberger he placed the deed in question on record, although he believed the deed to be invalid, and although he had been named as coexecutor of the will of Mrs. Dornberger. He further testified that, in preparing the inventory and appraisement in Mrs. Dornberger's estate, he did not list the home property as an asset of the estate.

We believe that the trial court, under the rule of the cases cited, had the right to conclude that he was in error in his testimony as to the instructions that Mrs. Dornberger gave him with reference to the deed in question in so far as the attaching of any conditions to its delivery was concerned.

[4] There seems to have been no question about the desire of Mrs. Dornberger that respondent have the home property. Even appellants concede that, although they, of course, assert, that "she legally failed to grant and convey it to her". The declarations of Mrs. Dornberger made before the signing of the deed show her intention to deed the property to respondent. Her declarations made after the signing of the deed were to the effect that she had made a deed and had given the property to respondent. Such declarations are admissible as bearing on the question of delivery and support the finding of the trial court that Mrs. Dornberger intended to and did deliver a deed of said real property to respondent, and that it was not her intention to reserve any power to recall or modify said deed.

[5] It seems to be the settled law in California that in a case where the thing in issue is whether or not the grantor has parted with title, the declarations of the grantor made prior to, at the time of, and subsequent to the making of the deed, are admissible.

In the case of Williams v. Kidd, 170 Cal. 631, at page 648, 151 P. 1, at page 7, Ann. Cas.1916E, 703, the court said: "But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case; the claim of respondents being that there had been no delivery of the deed with intent on the part of Williams to do so. The conduct and declarations of Williams covered a period subsequent to the making of the deed and while Kidd held it as a depositary, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed."

In the case of Fisher v. Oliver, 174 Cal. 781, at page 788, 164 P. 800, at page 803, the court said: "* * * when the very question in issue is whether the grantor has parted with title and whether in fact he has delivered his deed to this end, evidence of his acts, including herein his declarations after the time when it is contended he had so parted with title, is admissible and of great weight in the determination of this question."

To the same effect are Sprague v. Walton, 145 Cal. 228, 78 P. 645, and Belser v. American Trust Co., supra.

[6, 7] It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses. An appellate court will not disturb the findings of the trial court when there is a substantial conflict in the evidence on material points, and when there is some evidence to support the findings. The record in this case shows a substantial conflict in the evidence, and there is ample evidence to sustain the judgment.

In view of the foregoing, the judgment should be and is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




37 Cal.App.2d 189

**ROBERTSON v. BROWN et al.**

**Civ. 12360.**

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1940.

Hearing Denied April 4, 1940.

**1. Appeal and error ⇐1001(1)**

Implied findings of a jury will not be disturbed if supported by substantial evidence.

**2. Automobiles ⇐181(7)**

Excessive speed alone, unattended by circumstances indicating an intention to injure, or wanton disregard for safety of automobile guest, is insufficient to constitute actionable "willful misconduct" on part of motorist.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

**3. Automobiles ⇐181(1)**

The factors necessary to prove "willful misconduct" of motorist so as to create lia-

bility to guest injured in automobile accident are that the motorist intentionally did something in driving that he should not have done or that he failed to do what he should have done under the circumstances express or implied that an injury to a guest would be a probable result.

**4. Automobiles ⇐181(1)**

In order for an act of motorist to constitute "willful misconduct" so as to create liability to guest injured in automobile accident, it must be an intentional act with a knowledge that serious injury is a probable result or an intentional act with a wanton and reckless disregard of its probable result and such intent and knowledge of probable injury may not be inferred from the facts showing an act or omission constituting negligence.

**5. Automobiles ⇐181(7)**

Where excessive speed of automobile appears to be attributable to a lack of care and not to a disregard by the motorist of probable consequences, motorist is not guilty of "willful misconduct" so as to entitle automobile guest to maintain action against motorist for injuries sustained in a collision.

**6. Automobiles ⇐181(1)**

The mere failure of motorist to perform a statutory duty is not alone "willful misconduct" which would entitle automobile guest to maintain action for injuries sustained in accident and to constitute such misconduct, there must be actual knowledge on part of motorist of peril to be apprehended from failure to act to the end of averting injury.

**7. Automobiles ⇐244(20)**

In automobile guest's action for injuries sustained in collision which occurred when automobile which was traveling at speed of 45 to 50 miles per hour, struck defect in road which was not apparent and existence of which was not known to motorist, evidence sustained judgment for motorist on ground that motorist was not guilty of "willful misconduct" required to entitle guest to maintain the action.

**8. New trial ⇐100**

In guest's action for injuries sustained in automobile accident, wherein guest introduced deposition of an occupant of automobile at time of accident, tending to prove motorist's willful misconduct, and motorist to impeach testimony of the occupant introduced claim filed by occupant with city in which occupant purportedly averred that motorist drove carefully, affidavit of occupant presented on motion for new trial wherein occupant denied statements contained in claim and averred reckless driving of motorist did not disclose "newly discovered evidence" so as to entitle guest to new trial.

[Ed. Note.—For other definitions of "Newly Discovered Evidence," see Words & Phrases.]

**9. New trial ⇐102(3)**

To justify new trial on ground of "newly discovered evidence," the evidence if locked within secret consciousness of adversary must be shown to have been undiscoverable by reason of perjury of such adversary and it must be shown that due diligence of the aggrieved party has otherwise been exercised.

**10. Appeal and error ⇐977(1)**

The trial court is tribunal before whom review of record or review of affidavits upon motion for new trial must be had and trial court's decision is final except where it may appear that there has been an abuse of discretion.

**11. Appeal and error ⇐1050(1)**

In guest's action for injuries sustained in automobile accident, question inquiring whether red reflectors were placed at corner where accident occurred after the accident, objection to which was sustained, was not prejudicial to the guest.

**12. Automobiles ⇐240(2)**

In guest's action for injuries sustained in automobile accident, motorist's testimony concerning his intentions with respect to hitting curb and concerning probabilities of hitting curb was proper under charge of his willfully injuring the guest.

**13. Appeal and error ⇐930(2)**

The jury was presumed not to have considered as evidence questions concerning which objections were sustained.

**14. Appeal and error ⇐207**

Where plaintiff did not request trial court to correct impression made by argument of counsel for defendant, plaintiff could not complain.

**15. Appeal and error ⇐207**

In order to gain advantage of misconduct of counsel, the aggrieved party must have appealed to the trial judge at time of occurrence.

**16. Automobiles ⇐181(1)**

"Willful misconduct" of motorist which will create liability to automobile guest injured in automobile accident is not the same thing as "gross negligence" and involves more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.

[Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

**17. Automobiles ⇐181(1)**

An automobile guest may recover from motorist for injuries sustained in automobile accident only where motorist has been guilty of "willful misconduct", which implies at least the intentional doing of something either with knowledge that serious injury is probable result or intentional doing of an act with wanton and reckless disregard of its possible result, the word "willful" implying intent, which relates to the misconduct and not merely to the fact that some act was intentionally done.

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

**18. Appeal and error ⇐1064(1)**
**Trial ⇐229**

Repetition of exposition of doctrine of willful misconduct in instructions in guest's action for injuries sustained in automobile accident, was improper but was not prejudicial error where the facts of the controversy were fully developed and the doctrine of willful misconduct was clearly defined by the instructions.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by William W. Robertson against Eleanor Brown and others for injuries sustained in an automobile accident. From a judgment for defendant, C. Ranson Samuelson, the plaintiff appeals

Affirmed.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

Joseph A. Ball and Frank C. Charvat, both of Long Beach, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment after verdict by a jury in favor of defendant Samuelson. The action was for damages on account of the alleged wilful misconduct on the part of the defendant. One night in May, 1935, plaintiff and one Ziebarth were guests of defendant Samuelson as he drove a Pierce Arrow Convertible Phaeton along Ocean boulevard east of Long Beach. The three had played at cards and lingered over their cups until the approach of midnight when they agreed to make their nocturnal drive in quest of more substantial refreshments.

The contentions made on this appeal are: (1) that the verdict and judgment are contrary to the law and the evidence; (2) that the court erred in denying the motion for a new trial; (3) that defendant's counsel was guilty of prejudicial misconduct; and (4) that prejudicial errors occurred in the instructions.

(1) Plaintiff contends that as the car rolled along the said highway at 60 miles per hour, he and Ziebarth both repeatedly admonished defendant to diminish his speed; that on the car's hitting a jog in the curb at 55th place, while speeding at 50 miles per hour, the car catapulted 50 feet, throwing both guests through the air and on to the earth; that the boulevard at the point of impact passes through a residential area in which the garages open on to said boulevard; that defendant was familiar with said boulevard in said vicinity and considered it dangerous because it was cut up with chuck holes and covered with sand; that the night was clear; visibility good and the pavement dry; that by means of his headlights, defendant could see the road 100 feet ahead and while his vision was unobstructed for 200 feet at said intersection, defendant, according to his own testimony, could have stopped the car within 75 feet if going at 50 miles per hour; that defendant was reckless and wanton in his speed and manner of driving and that said recklessness was the proximate cause of plaintiff's injuries. Upon the evidence thus summarized, plaintiff urges that defendant's acts constituted wilful misconduct and that the judgment should be reversed in spite of the verdict.

[1] In view of the rule that implied findings of a jury will not be disturbed if supported by substantial evidence, we have taken notice of the proof presented on behalf of defendant and which presumptively controlled the jury in their deliberations. From the testimony of the defendant and other witnesses, the jury impliedly found that defendant did not fail to slow down at any request of either guest; that he slowed down to 35 miles per hour within the first one-

quarter mile and again after going a mile and a half to Livingston drive; that east of said drive, the boulevard is a one-way street divided by a right of way, the south half of which is used by east bound traffic only; that no streets intersect the south half; that between Livingston and 55th place no cars preceded defendant; that west of 55th place, it is a two-way drive for two or three blocks; that for one mile east of Livingston, there were no houses on the south side of Ocean boulevard; no traffic could cross the highway; that the pavement was good; that from said Livingston drive to 55th place the speed of defendant was from 45 to 50 miles per hour; that the road at 55th was in a defective condition and exceedingly dangerous to vehicular traffic, of which condition defendant was ignorant at the time; that no signs or lights or other signals of any kind appeared; that from 54th place to 55th place the boulevard is 37 feet wide; that it narrows to 20 feet at 55th place; that for years the traffic had used the north 20 feet thereof; that before the accident the south 20 feet had been paved from 54th to 55th with white cement which attracted the traffic; that because of the fact that the boulevard narrowed at 55th place to 20 feet, and said cement ends at said intersection, a sharp turn to the left was required; that no white lines had been painted upon the highway to direct the course of travel; that at the time of defendant's approaching said intersection, the wind-laid sand was flush with the sidewalk and the curb line so that it was not distinguishable by defendant; that nothing indicated the jog; that the sand confused defendant's vision; that defendant had his foot on his brakes as completely as he could and yet avoid tipping the car at the turn; that his only knowledge of the locus was based on his having lived in a house east of 55th place ten years before the accident when conditions were not the same as those in 1935; that in 1925 there was no necessity to make the turn at 55th place; that for five years before the accident, defendant had not driven along that stretch of the boulevard; that he did not know of the defective condition.

[2] From the foregoing summary, it appears that the premise upon which plaintiff bases his claim of wilful misconduct of defendant is the speed at which defendant drove. Excessive speed alone, unattended by circumstances indicating an intention to injure, or a wanton disregard for the safety of, the guest, is insufficient to constitute actionable wilful misconduct. The fact that a motorist in a Cord car raced at 73 miles per hour, in a fog, drove on the left side of the highway near a "slow" sign to pass another speeding car and then returned to the right-hand lane where his Cord collided with a Dodge standing across the highway did not constitute wilful misconduct and judgment for defendant notwithstanding the verdict should have been entered. McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189. Where a driver proceeded at 60 miles per hour and the road was fifteen feet wide and was bounded by soft shoulders and the guest remonstrated at the defendant's attempt to pass a car, defendant continued laughing at and ignorant of her perils, it did not appear that she knew or should have known that injury was probable. Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948. A driver, 21 years of age, had been driving 6 years; he proceeded on a wet, slippery pavement at 35 miles per hour; his car, in good condition, did not skid until he turned to avoid an approaching car when it ran off the highway and got out of his control and overturned; he thought he could drive safely but did not believe "that any serious injury was probable". Although he was mistaken and although "he may * * * have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable". Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279, 281. Another driver neglected to inspect his truck after notice of a defective rear end and, while descending a 6 per cent grade at 20 miles per hour, something suddenly gave way. The truck proceeded without motor compression. He lost control, became frantic, and the truck jumped the bank, overturned and the driver and his guest were both injured. It was held that no wilful misconduct was shown. Turner v. Standard Oil, 134 Cal.App. 622, 25 P.2d 988.

[3-6] It must be shown that "such acts were done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result". McLeod v. Dutton, supra [13 Cal.App.2d 545, 57 P.2d 191]. The factors necessary to prove wilful misconduct are (1) that the driver intentionally did something in driving that he should not have done or (2) that he failed to do what he should have done,

under the circumstances express or implied "that an injury to a guest will be a probable result". Hall v. Mazzei, supra [14 Cal.App. 2d 48, 57 P.2d 950]; Turner v. Standard Oil, supra. For an act to be wilful misconduct, it must be an intentional act with a knowledge that serious injury is a probable result, or an intentional act with a wanton and reckless disregard of its possible result. Howard v. Howard, supra. "Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence * * *." Meek v. Fowler, 3 Cal.2d 420 at page 426, 45 P.2d 194 at page 197. Where excessive speed appears to be attributable to a lack of care and not to a disregard of the probable consequences, the driver is not guilty of wilful misconduct. Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292. "The mere failure to perform a statutory duty is not, alone, willful misconduct. * * * To constitute 'willful misconduct' there must be actual knowledge * * * of the peril to be apprehended from the failure to act * * * to the end of averting injury." Wright v. Sellers, 25 Cal.App.2d 603, 608, 78 P.2d 209, 212.

[7] Therefore, the defendant, though negligent, could not be said to have intended probable injury to his guests. They were congenial friends, enjoying together the harmony of a convivial evening; traveling to a place where they proposed to extend its delights. With no houses to the south; no traffic to reckon with; with a dangerous jog in the curb concealed from view by aeolian deposits; with no lines to guide, no signs or markings to warn of the lurking dangers, the slightest neglect might have resulted in disaster. But while it was a situation that might have required extraordinary care to insure one's own safety, there was nothing to indicate that defendant knew that injury to his guest would probably result from his thus driving along said approach to said intersection. Turner v. Standard Oil, supra. Certainly, a jury's finding that he intended no such mischief or that he did not proceed wantonly is abundantly justified.

The authorities cited by plaintiff belong to that line of cases where the misconduct was proved by reason of the driver's knowledge of the highway and of the defective or dangerous condition which caused the collision. Coogan Productions v. Industrial Accident Comm., 21 Cal.App.2d 225, 68 P.2d 750; Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172; Olson v. Gay, 135 Cal. App. 726, 27 P.2d 922. It is, therefore, clearly the law that where the trier of facts is convinced that the driver charged with wilful misconduct has transgressed in no particular except in travelling at a high rate of speed and is free from a wanton disregard of possible injury to his guest, he will not be held liable. His liability must arise out of such behavior as will indicate to the court that the defendant was utterly indifferent to injuries probably to result from conditions which were ignored as he recklessly proceeded. Under this doctrine, the defendant is exonerated.

[8] (2) Plaintiff introduced the deposition of said Ziebarth tending to prove defendant's wilful misconduct. Defendant, to impeach said witness, introduced a claim which Ziebarth had filed with the city of Long Beach in which Ziebarth is purported to have averred that defendant drove carefully on said occasion. In support of the motion for a new trial, said Ziebarth's affidavit was presented. In it he denied the statements contained in said claim so filed, and averred the reckless driving of defendant. Because this affidavit was not controverted, plaintiff contends the denial of his motion was error. But this is not such "newly discovered" evidence as warrants a new trial. The deposition of Ziebarth was read in evidence. He must have told then all he knew of the facts in his deposition when he was confronted by both counsel. His alleged claim was an ex parte act. To hold another trial to have Ziebarth repeat his story to a different jury is a proceeding wholly unwarranted by our practice. Moreover, it cannot be presumed now that the jury was influenced solely by Ziebarth's testimony or by its alleged impeachment by his said affidavit.

[9, 10] Neither would the end of justice be subserved by having defendant's purported remarks of friendliness to plaintiff related upon another trial. To justify a new trial on the ground of newly discovered evidence, such evidence, if locked within the secret consciousness of the adversary, must be shown to have been undiscoverable by reason of the perjury of such adversary, and that due diligence of the aggrieved party has otherwise been exercised. The trial court is the tribunal before whom a review of the record or a review of affidavits upon such a motion must be had. His decision is final except where it may ap-

pear that there has been an abuse of discretion.

(3) An inquiry by plaintiff's counsel to prove defendant's knowledge of the fact that the stretch near 55th place was within a 25-mile zone was answered after objection and argument by defendant's counsel. The argument made was within legitimate limits.

[11-15] Plaintiff's objection was sustained to defendant's inquiry whether red reflectors were placed at said corner after the accident. This did no injury to plaintiff. Defendant's testimony as to his intentions with respect to hitting the curb and as to the probabilities of hitting the curb was proper under a charge of his wilfully injuring plaintiff. Plaintiff's objection was sustained to the inquiry of defendant whether he had investigated the number of accidents. The jury is presumed not to have considered questions as evidence. Finally, plaintiff's complaint that he was prejudiced by certain arguments of defendant's counsel is without support. The specified arguments do not appear to have been inappropriate but, in any event, the trial court was not requested to correct their impressions. To gain advantage of misconduct of counsel the aggrieved party must have appealed at the time of the occurrence to the judge. People v. Babcock, 160 Cal. 537, 117 P. 549; Scott v. Times-Mirror, 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007. The authorities cited by plaintiff are cases in which the trial judge granted a new trial. Merralls v. Southern Pacific, 182 Cal. 19, 186 P. 778; Greening v. Ford, 127 Cal.App. 462, 16 P. 2d 143; Anderson v. United Stages, Inc., 192 Cal. 250, 219 P. 748. Had the trial judge granted a new trial in this case, it is not likely that defendant would have appealed.

(4) Plaintiff sets forth some 15 instructions given at the request of defendant which, he says, are "confusing, ambiguous and repetitious". But practically all of them define wilful misconduct substantially as defined under subdivision (1) of this opinion and are in harmony with the instructions requested by plaintiff. For illustration, defendant's instruction No. 10 reads as follows: "Wilful misconduct is not the same thing as gross negligence. Wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. The law has excluded in a case where a guest is suing a driver all forms of negligence as a basis for recovery. The law will only permit a recovery where a guest sues a driver where it appears that the thing done by the defendant amounts to misconduct as distinguished from negligence, and the law further states that this misconduct must be wilful. While the word 'wilful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. * * Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result".

[16-18] This instruction is a correct exposition of the doctrine of wilful misconduct. That doctrine is substantially repeated in defendant's instructions 5, 6, 7, 8, 9, 12, 13, 18, 19 and 20. Such repetition we must condemn as an unwholesome practice but we cannot say that prejudicial error resulted. The facts of the controversy were fully developed and said doctrine was clearly defined by said instructions as well as by those requested by plaintff. Instruction No. 16 is a fair admonition to consider defendant's ignorance of the condition of the highway. No. 14 is a proper instruction that excessive speed would "not of itself" justify a verdict against defendant. The above instructions are supported by the authorities first cited under (1) hereof. No. 15 is a meaningless utterance but harmless as to plaintiff. Defendant's instruction 11 is a correct statement of the law appertaining to the rights of a guest.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

37 Cal.App.2d 155

**In re MORRIS' ESTATE.**

**PEOPLE v. THOMAS et al.**

**Civ. 6317.**

District Court of Appeal, Third District, California.

Feb. 3, 1940.

**Executors and administrators ⇐261**

Taxes due from an estate for retail sales of intangible personal property in the course of operating a business belonging to the estate, pending the administration thereof, are not to be classified merely as "ordinary expenses of administration" but rather as "excise taxes" imposed for privilege of conducting a business and for selling at retail, in payment of which the state is entitled to priority. Probate Code, § 572; Gen.Laws Supp. 1933, Act 8493, §§ 2(a), 9, 12, 18.

[Ed. Note.—For other definitions of "Excise," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Proceeding in the matter of the estate of Charles Henry Morris, wherein the People of the State of California applied for an allowance of sales taxes as a preferred claim, opposed by Gertrude Hazel Morris Thomas, administratrix, and Martha M. Morris and others, creditors. From an order refusing to direct payment of the sales taxes as a priority claim, the State of California appeals.

Order reversed in so far as it denies priority to the State, with directions.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for appellant.

Haigt, Trippet & Syvertson and Gerald W. Myers, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The State of California has appealed from an order of the probate court of Los Angeles county in the Estate of Charles Henry Morris, deceased, refusing to direct the payment as a priority claim, of sales taxes due to the state under the provisions of the California Retail Sales Tax Act. Stats.1933, p. 2599; Deering's Gen. Supp.Laws, 1933, pp. 2359, 2360, Act 8493.

Charles Henry Morris died at Los Angeles October 5, 1932, possessed of real and personal property, including a printing business enterprise, together with stock on hand, which was sold to its customers at retail. An administratrix of his estate was duly appointed and qualified. On application to the court, the estate was authorized under section 572 of the Probate Code to operate the business pending the administration of the estate. In carrying on the business the administratrix made sales of tangible personal property prior to May, 1935, rendering the estate liable for the payment of sales taxes in the sum of $603.44, which were not paid. Upon citation to show cause why said taxes should not be paid forthwith as a preferred claim, the court adopted findings and made an order, May 15, 1935, to the effect that said sum was due and owing from the estate to the State of California as necessary "expenses of administration", and directed that it be paid in due course of administration. The appellant's application to allow the sales taxes as a preferred claim and to direct its immediate payment was denied. From that order the state has appealed. The respondent has filed no brief on appeal.

The only question to be determined is whether taxes due from an estate for retail sales of intangible personal property in the course of operating a business belonging to the estate under the provisions of section 572 of the Probate Code is a preferred claim payable pursuant to section 9 of the California Retail Sales Tax act, or whether it should be paid only as ordinary expenses incurred in due course of administration.

We are of the opinion the retail sales taxes which were found to be due from the estate are not to be classified merely as ordinary expenses of administration. On the contrary, they constitute an excise tax imposed by the state for the privilege of conducting a business and for selling at retail tangible personal property. People v. Herbert's of Los Angeles, Inc., 3 Cal.App.2d 482, 39 P.2d 829; Roth Drugs, Inc. v. Johnson, 13 Cal.App.2d 720, 730, 57 P.2d 1022; Estate of Chesney, 1 Cal.App. 30, 81 P. 679, 680. Regarding the nature of a collateral inheritance tax, which is also an impost or excise tax, the court says in the Chesney case, supra. "Such tax is not one of the expenses of administration, or a charge upon the gen

eral estate of the decedent, but is in the nature of an impost tax or tax upon the right of succession."

The retail sales tax is an excise tax imposed by the state upon every person or estate for the privilege of engaging in the retail business of selling intangible personal property. Section 12 of the act makes it a misdemeanor for a person to engage in the business of selling personal property at retail without first procuring a license to do so. The Retail Sales Tax Act applies to an estate just as it does to an individual. Section 2 (a) defines the word "person" as it is used in that act to also specifically include an estate.

Section 9 of the act provides that retail sales taxes shall become due and payable "on or before the fifteenth day of the month next succeeding each quarterly period" during which the sales occur. Section 18 of that act provides the authority for imposing a ten per cent penalty for failure to pay such sales taxes when due. It is therefore the duty of an administrator to pay those taxes promptly and to thereby save the estate the necessity of incurring the added expense of interest and penalties. Since the prompt payment of retail sales taxes is statutory, a claim by the state therefore is entitled to priority. Liberty Mutual Insurance Co. v. Johnson Shipyards Corp, 2 Cir., 6 F.2d 752, 756. In the case last cited it is said:

"It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims; and it is thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See State of Minnesota v. Central Trust Co., 94 F. 244, 247, 248, 36 C. C.A. 214, and cases there cited.

"The courts have sustained in numerous cases the right to priority of payment of taxes over all other claims. [Citing numerous authorities.]"

The principle announced in the preceding quotation to the effect that a claim for federal taxes is paramount to ordinary claims for the reason that the very maintenance of the government is dependent on their payment, is peculiarly applicable to the present case and to the payment of excise taxes which are provided for by statute.

The order is reversed in so far as it denies to the state the priority of its claim, and the court is directed to authorize the immediate payment of the ascertained retail sales taxes which are due.

We concur: PULLEN, P. J.; TUTTLE, J.




**PEOPLE v. VON BENSON.**

Cr. 3278.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1940.

Hearing Granted March 8, 1940.

Subsequent Opinion April 15, 1940.

See 101 P.2d 527.

**1. Criminal law ⇐935(1)**

Where accused was convicted by court sitting without a jury, on motion for new trial on ground that evidence was insufficient to sustain conviction, he was entitled to a review of the evidence, reconsideration of weight of evidence, and of credibility of the witnesses, and if evidence was insufficient, it was the duty of the court to set aside the conviction and order a new trial. Pen.Code, § 1181.

**2. Criminal law ⇐959**

Where accused was convicted by the court sitting without a jury, on motion for new trial on ground that evidence was insufficient to sustain conviction heard by a judge other than the one who tried case, on sufficient showing being made as to the absence of trial judge, or his inability to hear motion, it was duty of judge hearing motion to familiarize himself with the evidence and rulings made during trial, from reporter's transcript. Pen.Code, § 1181.

**3. Constitutional law ⇐269**
**Criminal law ⇐959**

Where accused was convicted by court sitting without jury and judge other than

one who tried case, without showing being made as to trial judge's inability to hear motion, heard motion for new trial without familiarizing himself with the evidence and the rulings made on trial, and concluded from a probation officer's report and trial judge's decision that accused was guilty, and refused accused right to urge or show insufficiency of evidence, accused was denied constitutional right to "due process of law." Pen.Code, § 1181; Pol.Code, § 4480; Code Civ.Proc. § 661.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

**4. Criminal law ⇐959**

Where accused was convicted by court sitting without jury, and no showing was made as to trial judge's inability to hear motion for new trial, it was error to permit a judge other than the one who tried case to hear and determine motion for new trial. Pen.Code, § 1181.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler and Frank G. Swain, Judges.

Richard C. K. Von Benson was convicted of violation of section 288 of the Penal Code, and he appeals.

Reversed and remanded, with directions.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

An information filed by the district attorney of Los Angeles county charged the defendant in counts 1 and 3 with a violation of section 288a of the Penal Code, while count 2 alleged the commission by him of certain acts denounced by section 288 of the Penal Code. Trial by the court sitting without a jury resulted in conviction of the defendant on counts 1 and 2 and his acquittal of the offense charged in count 3. A motion for a new trial was granted as to count 1, which was subsequently dismissed, and a like motion was denied as to count 2, whereupon the court pronounced judgment against the defendant on count 2, from which he prosecutes this appeal.

As a first ground of appeal it is urged that the court committed prejudicial error in denying the defendant the right to have the same judge who presided at the trial pass on the motion for a new trial as to count 2, and in the refusal of the judge presiding at the time the motion for a new trial was presented to hear argument that the evidence was insufficient to support the decision convicting defendant of the crime charged in count 2. In connection with this claim the record reflects the following proceedings as having taken place at the time the motion for a new trial was called for hearing and at which time a judge other than the one who presided at the trial was upon the bench:

"Mr. Gleason (Defendant's Counsel): This matter was heard before Judge Dockweiler without a jury, and being familiar with the facts I am wondering if it would not be advisable that he pass on the matter.

"The Court: Judge Dockweiler asked me to handle this. I asked him to handle all matters that were heard before him and thought he was going to do so, but something came up which made it impossible for him to be here and he made a special request that I handle all matters on his calendar this morning, including those where trials were had before him.

"Mr. Gleason: I was not making that request in criticism. Perhaps it would be admissible that your Honor become familiar with the facts as developed in the trial.

"The Court: I have read the probation officer's report.

"Mr. Gleason: Yes, but that is not sufficient. I would be willing that this matter be placed at the foot of the calendar, so that I may have more time to present this matter to your Honor.

"The Court: I would be glad to hear what you have to say. I don't want an extended speech, and I don't want you to cover what is already in the report, but anything unusual, I will be glad to hear it.

"Mr. Gleason: The report is what the boys told the probation officer when he was there, but I am referring to the evidence in the case, I don't believe the report goes into that.

"The Court: No doubt some of the same evidence was introduced at the trial. I am willing to hear what you have to say.

"Mr. Gleason: There were only two witnesses on behalf of the People.

"The Court: Don't argue that the defendant is not guilty because that is a settled matter. Judge Dockweiler found the defendant guilty."

[1] It is at once apparent that the conclusion of the judge hearing the motion for a new trial that the defendant was guilty and that his conviction was legally established was predicated solely and alone upon the fact that such judge had read the probation officer's report and that the judge who tried the defendant had found him guilty. On his motion for a new trial appellant was entitled to more than that. He was entitled to a review of the evidence; reconsideration of the weight of such evidence and of the credibility of the witnesses. The motion for a new trial was made pursuant to section 1181 of the Penal Code, one of the grounds of which is that a motion for a new trial must be granted "When the verdict is contrary to law or evidence", and also when the court "has erred in the decision of any question of law arising during the course of the trial". How a judge who did not preside at the trial and did not read the transcript of the evidence presented at the trial could determine either the sufficiency of the evidence or the correctness of the rulings made during the trial, is beyond our comprehension and understanding. A long line of authorities supports the statement that when any trial is had with the assistance of a jury, defendant is entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for a new trial. Smith v. Royer, 181 Cal. 165, 171, 183 P. 660. This being true, it must of necessity follow that even though a jury be waived, the defendant is certainly entitled to a review of the evidence when he makes application for a new trial; and if such review produces a conviction of evidentiary insufficiency to support the decision theretofore rendered, it is the plain duty of the trial court to set aside the decision rendered and order a new trial. In the instant case appellant was denied such review of the evidence because, from the statement of the judge who heard the motion for a new trial, the only evidence to which he gave any consideration was that embodied in the report of the probation officer.

[2-4] Extremely pertinent indeed, in our opinion, under the facts of this case, are the words of Webster quoted so often that by the "law of the land" is intended "a law which hears before it condemns". Certainly there should have been some showing as to the absence of the judge who tried the case or his inability to hear the motion for a new trial, and if a sufficient showing thereof were made it became the duty of the judge hearing such motion to familiarize himself with the evidence given at the trial and the rulings made during the trial from a perusal of the reporter's transcript. In concluding that appellant was guilty upon the evidence contained in the probation officer's report and because "Judge Dockweiler found the defendant guilty", the court denied appellant the right to show and urge the insufficiency of the evidence to justify the decision finding him guilty; thereby denying appellant due process of law in the determination of his guilt—a process guaranteed by both the federal and state Constitutions.

While the Penal Code makes no specific provision that the judge who tried a criminal case shall hear the motion for a new trial therein, nevertheless section 4480 of the Political Code reads, "With relation to each other, the provisions of the four codes must be construed (except as in the next two sections provided) as though all such codes had been passed at the same moment of time, and were parts of the same statute," and section 661 of the Code of Civil Procedure provides in part as follows: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court. * * *" Such being the law with reference to the adjudication of property rights, how much more so should a litigant whose liberty is at stake be entitled to the same safeguards in the matter of determining his motion for a new trial. No showing having been made as to either the absence of the judge who tried the case or his inability to hear the motion for a new trial, it was error for any other judge, under the circumstances and the facts disclosed by the record herein, to determine the same. The defendant having been denied due process of law in the matter of determining his motion for a new trial, the judgment pronounced against him must be set aside.

By reason of the foregoing, other points raised do not demand our consideration.

For the foregoing reasons, the order denying defendant's motion for a new trial is reversed, and the cause remanded, with directions to the court below to hear and determine the motion for a new trial in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.




37 Cal.App.2d 198

**BIGELOW et al. v. CITY OF ONTARIO et al.**

**Civ. 2435.**

District Court of Appeal, Fourth District, California.

Feb. 7, 1940.

**1. Municipal corporations ⇐767**

Condition of street rendering municipality liable for damages therefrom must not be a trivial defect, but must constitute an actual danger to a person using the street in a lawful manner. St.1923, p. 675.

**2. Trial ⇐143**

Conflicts in the evidence are addressed to the jury.

**3. Appeal and error ⇐989**

Where appellant contended that evidence did not support implied finding of jury, District Court of Appeal would confine itself to summary of evidence supporting verdict and would disregard conflicting evidence.

**4. Appeal and error ⇐1050(1)**

"Dip," as applied to a change in grade of street, generally refers to a descent of grade with a corresponding ascent, but use of the word by witnesses to refer to a drop from a hump without a corresponding ascent was not prejudicial where intended meaning was understood by all parties. St.1923, p. 675.

[Ed. Note.—For other definitions of "Dip," see Words & Phrases.]

**5. Automobiles ⇐303**

In action against city for injuries sustained by automobile guest as alleged result of defective condition of street, claim against city for damages suffered by some other person, offered as evidence that city had notice of dangerous condition of street, was improperly rejected, since proof was necessary to support the cause of action. St.1923, p. 675.

**6. Municipal corporations ⇐788(3)**

When an improvement such as street paving is planned by city officers and is constructed in accordance with such plan and when by carrying out that plan a dangerous condition has been created, the city is charged with notice of that condition. St. 1923, p. 675.

**7. Automobiles ⇐273**
**Judgment ⇐707**

Action against city for injuries sustained by motorist as alleged result of defective condition of street gave notice of condition to city and should have put city upon its inquiry, irrespective of outcome of action, so that city could not avoid liability in subsequent action by another, by denying notice of the condition, and whether condition was dangerous was to be determined in subsequent action irrespective of outcome of earlier action. St.1923, p. 675.

**8. Municipal corporations ⇐821(5)**

Whether a condition in a public street is actually dangerous and a menace to the safety of the traveling public is usually one of fact addressed to the triers of facts. St. 1923, p. 675.

**9. Municipal corporations ⇐819(1)**

Evidence of accidents at same place is some evidence that condition of street was dangerous so as to render city liable. St. 1923, p. 675.

**10. Automobiles ⇐306(4, 5, 7)**

In action against city for injuries sustained by automobile guest as alleged result of defective condition of street, evidence sustained recovery on ground that dangerous condition existed which proximately caused injury, and that officers of city had notice of the condition and failed to remedy it within a reasonable time. St.1923, p. 675.

**11. Appeal and error ⇐1002**

The District Court of Appeal cannot reverse a judgment supported by substantial evidence merely because there is much more evidence conflicting with it. St.1923, p. 675.

**12. Municipal corporations ⇐821(14)**

The sufficiency of warning given by city of dangerous condition of street should be

left to determination of the triers of fact. St.1923, p. 675.

**13. Appeal and error ⇐999(3)**

In action against city for injuries sustained by automobile guest as alleged result of defective condition of street, implied finding that sign, 390 feet north of danger point, having on it "DIP 300 ft.," was insufficient warning of condition, would not be disturbed. St.1923, p. 675.

---

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Pearl Bigelow and husband against the City of Ontario and another, for personal injuries sustained by the named plaintiff while riding over a public street of the named defendant as a guest in an automobile belonging to and being driven by her son-in-law. From a judgment for plaintiffs against the named defendant, and from an order denying a motion for judgment notwithstanding the verdict, the named defendant appeals.

Judgment and order affirmed.

Archie D. Mitchell, of Ontario, for appellant.

Martin J. Coughlin, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment against the city of Ontario for damages resulting from personal injuries suffered by Mrs. Pearl Bigelow, wife of N. H. Bigelow, on August 14, 1937, while riding over Sultana avenue, a public street of that city, as a guest in an automobile belonging to and being driven by her son-in-law. Appeal is also taken from an order denying a motion for judgment notwithstanding the verdict. The Southern Pacific Company was joined as defendant. Judgment went in its favor and no appeal has been taken from that portion of the judgment. We will hereafter refer to the city of Ontario as the city.

[1] The action against the city is brought under the public liability act, Stats. 1923, p. 675, which makes municipalities liable for damages resulting from a dangerous or defective condition of a public street, where the proper municipal officers had notice of such condition and had failed or neglected, for a reasonable time thereafter, to remedy such condition or take such action as might be reasonably necessary to protect the public against it. It is now well settled that such a condition must not be a trivial defect but must constitute an actual danger to a person using the street in a lawful manner. Rodkey v. City of Escondido, 8 Cal.2d 685, 686, 67 P.2d 1053.

The city earnestly maintains that the evidence fails to support the implied finding of the jury that there was a defective or dangerous condition on Sultana avenue at the point of the accident; that the responsible officers of the city had no notice of any such condition; that before the accident they did take such action as was reasonably necessary to warn the traveling public against the condition.

[2, 3] The foregoing contentions require us to summarize the evidence, which is sharply conflicting, on the question of there being a defective or dangerous condition in the street. Under the time-honored rule, that conflicts in the evidence are addressed to and settled by the jury, we will confine ourselves to a summary of the evidence which supports the verdict and judgment and will disregard the mass of conflicting evidence.

Sultana avenue runs north and south. Several years before the accident its grade was established by the city, and, by means of local improvement proceedings, it was paved by the city to the established grade. Plans, profiles and specifications for the improvement were prepared and adopted by the city and were followed by the contractor who did the work. No material change in the surface of the street had occurred between the time of the completion and acceptance of the work and the time of the accident.

Sultana avenue is crossed at near right angles by seven tracks, a series of parallel rails of the Southern Pacific Company. During the trial these tracks were numbered from one to seven with the numbers ascending from north to south. Tracks one and two are north of the place of the accident and are of no particular importance here. Tracks three, four, five and six parallel each other and are between seven and ten feet apart. Track five is the main line track. The others are are switching or yard tracks. Track seven is about thirty feet south of track six and parallels it.

The general grade of Sultana avenue slopes gently to the south. A few feet

north of track three there is a break in the grade where it rises slightly to the level of the four parallel tracks. Upon this level Sultana avenue crosses the tracks without material deviations except such as are ordinarily found in railroad crossings that have been in use for several years. At about the south rail of track six there is a break of grade and a rise in the pavement for a short distance, the exact length or heighth of which we cannot determine, However this rise is clearly shown in five photographs introduced in evidence by defendants. (Defendants' exhibits "L", "M", "N", "O", and "P".) The same photographs show that this rise ends abruptly and that the grade breaks sharply and descends to the south without either a curved or level space at the top. The evidence offered by the city shows that the grade descends three and three-tenths feet in twenty-nine feet to a point near the north rail of track seven where it either levels off or ascends slightly to that track. The city had placed a sign on the west side of Sultana avenue about three hundred feet north of the tracks. This sign stood about three hundred ninety feet from the sharp break in the grade and had on it "DIP 300 ft.". It is admitted that the other warning signs shown in the photographs were placed on the street after the accident.

[4] During the trial the witnesses continually referred to this break in the grade as a "dip". It is rather clear that in using the expression "a dip" they referred to the descent of grade from the high point south of track six and did not refer to any descent of grade with a corresponding ascent which is the usual meaning of that term. There was no "dip" in the pavement as that term is generally understood but rather a sharp hump south of the south rail of track six. The intended meaning given to the word "dip" by the witnesses, particularly those of plaintiffs, to describe a drop from a hump in the road, instead of a saucer shaped depression, seems to have been understood by all parties so that no prejudice resulted therefrom.

Shortly after ten o'clock on the morning of August 14, 1937, plaintiffs were riding south on Sultana avenue in a sedan. R. Greenhill was driving and N. H. Bigelow was sitting on the front seat at his right. Mrs. Pearl Bigelow and Mrs. Hazel Greenhill, her daughter, occupied the rear seat. The evidence is uncontradicted that in traversing Sultana avenue to the place of the accident the speed of the sedan was between twelve and fifteen miles an hour.

None of those in the sedan had traveled over Sultana avenue before nor did they know anything of the grade line of the street. The driver testified that he did not know of the descent south of track six until the front of his car had reached it; that as the front of his car was descending the grade he felt the rear "sort of whip up"; that it was thrown up; that his wife called a warning and he stopped within twenty feet; that he found Mrs. Bigelow lying between the seats on the floor boards seriously injured. This testimony, in respect to the rear of the car being thrown up, was corroborated by the three passengers. Mrs. Bigelow testified that she was thrown violently against the top of the sedan and fell between the seats. She was seriously injured. Mrs. Greenhill testified that "we crossed the tracks and the next thing I knew we bounced up to the top of the car"; that she fell on the seat and was shaken but not injured.

Plaintiffs produced witnesses who testified that they had driven over this same portion of Sultana avenue, one of them many times; that the rears of their cars were always thrown up when they crossed the hump south of track six at speeds ranging between ten and fifteen miles an hour.

Plaintiffs produced Mrs. Edna Hughes as a witness. She testified that in 1936 she was riding in a Pontiac sedan, traveling fifteen miles an hour, on Sultana avenue across the Southern Pacific tracks; that, at the same hump involved here, she was thrown forward and injured. It appears from her cross-examination that she subsequently, probably before the injury of Mrs. Bigelow, sued the city for damages.

[5] Plaintiffs called the clerk of the city as a witness. He produced a claim against the city for damages suffered by some person. This claim was offered as evidence that the city had had notice of the dangerous condition on Sultana avenue. An objection on behalf of the city to the receipt of this claim in evidence was sustained. The trial judge even refused to allow it to be marked for identification so a copy of it is not in the record. However, from the remarks of counsel we may assume it was the claim filed by Mrs. Hughes for damages suffered by her in the accident already mentioned.

The ruling by the trial court was serious error. The question of notice to the city of the dangerous condition of the roadway was an important issue in the case, proof of which was necessary to support plaintiffs' cause of action. Proof of other known prior accidents at the same place has been held to constitute notice of a defective or dangerous condition. Magnuson v. City of Stockton, 116 Cal.App. 532, 3 P.2d 30; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723. Certainly there could be no more competent evidence of notice of a dangerous or defective condition of a street than a claim filed by a person who had been injured while traveling over it.

[6] While we are discussing the question of notice we should advert to the rule, which is well established, that when an improvement, such as street paving, is planned by city officers and is constructed in accordance with such plan, and when by carrying out that plan a dangerous or defective condition has been created, the city is charged with notice of that condition. George v. City of Los Angeles, supra; Rafferty v. City of Marysville, supra; Black v. Southern Pacific Co., 124 Cal.App. 321, 12 P.2d 981. In Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal. App.2d 215, 82 P.2d 216, 219, it was held that it was unnecessary for a plaintiff to allege any further notice where the "city created the condition for which plaintiff seeks to hold it liable".

[7] Further, the suit by Mrs. Hughes against the city was notice of the condition and should have put the city upon its inquiry. Counsel for the city argues that Mrs. Hughes was unsuccessful in her suit and therefore neither her claim nor her suit was notice that the condition was dangerous. This argument goes entirely outside the record which contains nothing concerning the results of that action. We are here concerned with the question of notice of the condition, not with the outcome of the suit by Mrs. Hughes. Her claim and suit gave notice of the condition. The question of whether or not that condition was dangerous was a fact to be determined in this action and did not depend on the outcome of the suit by Mrs. Hughes.

[8, 9] The question of whether or not a condition in a public street is actually dangerous and a menace to the safety of the traveling public is usually one of fact which is addressed to the triers of facts. Norton v. City of Pomona, supra. Evidence of accidents at the same place is some evidence that the condition was dangerous. Magnuson v. City of Stockton, supra; Uttley v. City of Santa Ana, supra; Norton v. City of Pomona, supra. Here we have evidence that Mrs. Hughes had been injured in an accident similar to that of Mrs. Bigelow, in addition to the evidence of Mrs. Bigelow's injury. We also have evidence that other cars were thrown up in crossing the hump, though there was no evidence of any personal injuries in those instances. There is also evidence of the physical condition of the hump and the descent south of it. Other evidence that many cars had crossed the hump without being thrown up created a conflict in the evidence which the jury resolved against the city.

[10, 11] After a careful study of all of the record we have reached the conclusion that there is sufficient evidence in the record to support the implied findings of the jury that a dangerous condition existed in Sultana avenue which proximately caused the injury to Mrs. Bigelow, and the further implied finding that the responsible officers of the city had notice of that condition and failed to remedy it within a reasonable time. It is true that there is much strong evidence in the record controverting plaintiffs' evidence that the condition was dangerous. That merely created a conflict which the jury resolved against the city. We cannot reverse a judgment supported by substantial evidence merely because there is much more evidence conflicting with it. Such conflicts in the evidence are settled in the trial court.

[12, 13] We must next consider the sufficiency of the warning of the condition given by the city. As we have observed, the only warning at the time of the accident consisted of a sign, three hundred ninety feet north of the danger point, having on it, "DIP 300 ft.".

In Sandstoe v. Atchison T. & S. F. Ry. Co., supra, it was held that the sufficiency of the warning given by the city of a dangerous condition "clearly should be left to the determination of the triers of facts". This rule should be applied here. About

three hundred feet from the sign (the distance stated by the warning) there was a change of grade. Having traveled the three hundred feet, and having observed that change of grade, did the sign give the driver warning of another and more serious change of grade ninety feet further on? A jury should be permitted to answer this question after serious consideration of the sufficiency of the warning given and the misinformation the sign conveyed.

Under the facts here we cannot disturb the implied finding of the jury that the posting of this sign was not "such action as may be reasonably necessary to protect the public against such dangerous or defective condition". Stats. 1923, p. 675.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.




## KLOPSTOCK et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. *

Civ. 11233.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1940.

Hearing Granted April 4, 1940.

**1. Appeal and error ⇐1210(1)**

Unqualified reversal of judgment in derivative action on behalf of corporation placed parties in position to try case anew, subject to rule that decision on appeal, if applicable, governs conduct of subsequent action.

**2. Appeal and error ⇐1195(3)**

A decision of the District Court of Appeal that executor of the will of deceased legatee of deceased stockholder was not entitled to maintain derivative action on behalf of corporation while estate of deceased stockholder was in probate and undistributed was controlling to the extent that executor in his representative capacity could not maintain a second action, and if no further proceeding was instituted, dismissal of action was in order.

**3. Appeal and error ⇐1195(3)**

The effect of decision by the District Court of Appeal that executor of the will of deceased legatee of deceased stockholder was not entitled to maintain derivative action on behalf of corporation was that demurrer should have been sustained on ground that executor did not have legal capacity to sue. Code Civ.Proc. § 430, subd. 2.

**4. Appeal and error ⇐1201(7)**

If trial court upon hearing of demurrer had determined that executor of the will of deceased legatee of deceased stockholder was not entitled to maintain derivative action on behalf of corporation, but that there was a proper available representative of deceased stockholder's estate, the trial court upon its own motion could have ordered a substitution of the party plaintiff by amendment to the complaint, and where, after appeal, case was in identical position in which it stood prior to trial, court could with equal propriety order substitution after appeal unless it interfered with rights of defendants.

**5. Appeal and error ⇐1201(1)**

If the rights of parties are finally adjudicated upon appeal, as by the court giving a direction to the trial court to enter a specific judgment, the trial court may not permit amended or supplemental pleadings.

**6. Parties ⇐36**

The trial court must determine completely any controversy between parties when it can be done without injustice to the rights of others, and where determination requires the addition of parties plaintiff or defendant, amended, supplemental, or additional pleadings may be filed upon motion of either party, or an intervening party, or upon the court's initiative, if such becomes necessary to serve the ends of justice, and where correct determination cannot be had without additional parties, the additional pleadings must be permitted. Code Civ.Proc. § 389.

**7. Pleading ⇐229**

Amendments to pleadings are to be liberally permitted providing amendment does not state a different cause of action. Code Civ.Proc. § 389.

**8. Appeal and error ⇐949**

An order granting relief by addition of parties plaintiff or defendant is remedial and will not be disturbed upon appeal unless it

* For subsequent opinion, see 108 P.2d 906.

appears that there was an abuse of the court's discretionary powers. Code Civ.Proc. § 389.

**9. Parties ⇐51(4)**

The added or substituted party's willingness to appear is a circumstance to consider in determining whether an order permitting addition of parties plaintiff or defendant was properly entered. Code Civ.Proc. § 389.

**10. Parties ⇐51(4)**

The statutory provision that when a complete determination of controversy cannot be had without presence of other parties, court must then order them to be brought in, is mandatory. Code Civ.Proc. § 389.

**11. Parties ⇐52, 53**

An order directing addition of an indispensable party may be made at any time and on the court's own motion. Code Civ.Proc. § 389.

**12. Appeal and error ⇐1201(7)**

Where judgment was reversed by the District Court of Appeal without qualification on ground that executor of the will of deceased legatee of deceased stockholder was not entitled to maintain derivative action on behalf of corporation, the trial court was authorized to permit the filing of an amended and supplemental complaint in which administratrix with the will annexed of the estate of deceased stockholder was named as a plaintiff, in absence of indication that purpose of amendment was to vex and annoy by exciting groundless judicial proceedings. Code Civ.Proc. §§ 389, 464, 473; Pen. Code, §§ 158, 159.

---

Mandamus proceeding by Frederick Klopstock and others against the Superior Court of the State of California, in and for the City and County of San Francisco, to compel defendant to enter a dismissal of an action filed by Samuel M. Samter, as executor of the will of Grace E. Klopstock, deceased, against the Klopstock Realty Company, Frederick, Samuel, and David Klopstock.

Alternative writ discharged. Petition for peremptory writ to compel dismissal of action so far as it related to David Klopstock granted, but denied as to the others.

Joseph T. O'Connor and Leo Friedman, both of San Francisco, for petitioners.

H. U. Brandenstein and Samuel M. Samter, both of San Francisco (J. J. Posner, of San Francisco, of counsel), for respondent.

WARD, Justice.

A petition for a writ of mandate to compel respondent court to enter a dismissal of an action filed by Samuel M. Samter as executor of the will of Grace E. Klopstock, deceased, against the Klopstock Realty Co., a corporation, Frederick, Samuel and David Klopstock.

Plaintiff Samter, as executor of the estate of Grace E. Klopstock, deceased, widow of Isaac D. Klopstock, sought in a representative capacity to recover for the benefit of the Klopstock Realty Co. certain sums of money as set forth in the complaint. Judgment was rendered, based on the theory of fraud, not in favor of the Klopstock Realty Co., but for the "Estate of Isaac D. Klopstock, deceased, and the personal representative of said deceased and said estate" against Frederick and Samuel Klopstock, and in favor of David Klopstock. Frederick, Samuel and the Klopstock Realty Co. appealed. The judgment rendered in favor of David has become final.

On appeal, the court set forth the facts as follows (Samter v. Klopstock Realty Co. et al., 31 Cal.App.2d 532, 533, 534, 88 P.2d 250, 251): "For many years three brothers, Isaac, Frederick and Samuel Klopstock, were partners in a partnership known as Klopstock Bros. Said partnership was engaged in a manufacturing business. In 1926, they organized the defendant corporation, the Klopstock Realty Co., and transferred their joint real estate holdings to the corporation including the premises on which the partnership conducted its business. The brothers were equal owners of all of the issued stock of the corporation and constituted the board of directors thereof. The partnership and the corporation continued to do business thereafter and each of the three brothers drew a salary of $750 per month, apportioned $500 from the partnership and $250 from the corporation. The partnership was not charged any rental by the corporation for the use of the premises occupied by the partnership. Isaac became incapacitated in 1928, but his monthly salary of $250 per month was paid by the corporation until 1930. In that year, Frederick and Samuel decided that the salary payments to Isaac should cease but Frederick and Samuel continued to draw $250 per month each as salary from the corporation. In 1933, Isaac died and his will was admitted to probate. Grace E. Klopstock, the wife of Isaac, and Frederick were appointed executors of the will of Isaac D.

Klopstock, deceased, and served as such until the death of Grace Klopstock in 1935. Thereafter plaintiff was appointed executor of the will of Grace E. Klopstock, deceased, and he brought this action. Frederick continued to act as executor of the will of Isaac D. Klopstock, deceased, after the death of Grace E. Klopstock and the estate is still in probate. * * * Regarding the status of the shares of the capital stock standing in the name of Isaac, it was alleged that 'said shares do now constitute part of the estate of said Isaac D. Klopstock, deceased'. It was further alleged that 'at the time of the death of said Grace E. Klopstock, she was entitled to all or part of the estate of said Isaac D. Klopstock, deceased' including said shares. Plaintiff prayed for a judgment 'that said defendants Frederick Klopstock and Samuel Klopstock do pay unto said defendant corporation' a sum alleged to be due as rental and that said defendants 'restore and repay to said defendant corporation' a sum alleged to have been withdrawn by said defendants as above set forth."

In reversing portions of the judgment from which the appeal was taken, the court said (31 Cal.App.2d page 536, 88 P.2d at page 252): "The point which appellants make is that a derivative action on behalf of a corporation may not be brought by an heir or legatee or by the representative of such heir or legatee of a deceased stockholder while the estate of the deceased stockholder is in probate and undistributed. We are of the opinion that this point is well taken. Neither appellants nor respondent have cited any authority directly in point but we can see no justification for extending the right accorded to a stockholder to bring a derivative action on behalf of a corporation to one who may never acquire the right to become a stockholder of record and whose rights as heir or legatee or as representatives of such heir or legatee of a deceased stockholder may be fully protected through the representative of the deceased stockholder."

[1, 2] The effect of the above decision was an unqualified reversal, thereby placing the parties in a position to try the case anew, subject to the rule that the decision on appeal, if applicable, governs the conduct of subsequent action. Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521; Heinfelt v. Arth, 4 Cal.App.2d 381, 41 P.2d 191. The gist of the decision was that plaintiff as executor of the will of Grace E. Klopstock, deceased, legatee under the will of Isaac D. Klopstock, deceased, whose estate is still in probate, was lacking in capacity to sue for the benefit of the corporation; that redress for the wrong, if any, lies with the estate of Isaac and not with a representative of a deceased heir of his estate. The decision was controlling to the extent that plaintiff in his designated representative capacity could not maintain a second action, and if no further proceeding was instituted a dismissal would be in order.

Subsequently in respondent court the defendants moved to dismiss upon the ground primarily that the decision held plaintiff was not entitled to maintain the cause of action alleged in the complaint. About the same time, Samter, through his attorney, moved the court to permit the filing of an amended and supplemental complaint, in which Flora E. Short was named as a plaintiff upon the ground that since the commencement of the action of Samter v. Klopstock, supra, said Flora E. Short had been duly appointed and qualified as administratrix with the will annexed of the estate of Isaac; that the filing of the proposed supplemental complaint was in furtherance of justice and pursuant to the provisions of sections 389 and 473 of the Code of Civil Procedure. The removal of Frederick as executor of Isaac's estate had been accomplished by the probate of a later will of Isaac. Estate of Klopstock, 31 Cal.App.2d 568, 88 P.2d 722. The motion to bring in such new party and to file such amended complaint was granted by the respondent court; the motion to dismiss was denied.

The vital question involved in the petition herein is whether, in an action instituted by one wholly without right or interest in the litigation, a new party may be substituted by amendment to the complaint, thereby conferring jurisdiction on the court to try the case anew. The contention of petitioners herein is that after the decision in Samter v. Klopstock, supra, plaintiff Samter had no right to appear in any way.

[3] In the action, as filed originally, Samter did not seek redress for himself; he merely instituted the action to set the machinery of the court in motion. The judgment on the first appeal determined that a proper representative plaintiff had not appeared. The effect of the decision was that the demurrer should have been sustained upon the ground that plaintiff did not have legal capacity to sue. Code Civ.Proc., sec. 430, subd. 2. There was no direction by the

appellate court to dismiss the action; simply an order reversing the portions of the judgment from which the appeal was taken. In other words, the decision indirectly ordered that the demurrer should be sustained. Had such action been taken by the trial court, it would have been proper to have permitted plaintiff to amend, and if the amendment showed the appearance of a proper party plaintiff, with legal capacity to sue, the main objection in Samter v. Klopstock, supra, would have been overcome. This same end has been accomplished by the filing of a notice of motion to amend prior to a ruling upon the demurrer. Code Civ.Proc., sec. 464.

It should be noted that while Samter, in his representative capacity as executor of the estate of Grace Klopstock, prospective beneficiary of the estate of Isaac, was not the proper legal party plaintiff in Samter v. Klopstock, supra, he did not occupy the position of an entire stranger who sought to plunge the parties into litigation "and then get out from under", as petitioners herein claim "by asking the court to substitute the real party in interest in the place and stead of the meddling stranger". There is nothing before us to indicate that Samter's purpose was "to vex and annoy", Pen. Code, sec. 159, by "exciting groundless judicial proceedings," Pen.Code, sec. 158. We are unable to pass upon the merits of the cause of action stated in Samter v. Klopstock, supra, but in the decision on appeal it was indicated, though not decided, that had the action been instituted by one entitled to appear as a party plaintiff "the pleading and proof would have been sufficient to sustain a judgment in favor of the defendant corporation".

[4] If the trial court upon hearing the demurrer had determined that Samter was not entitled to appear in his capacity as representative of the estate of one of the deceased heirs and legatees of the Isaac Klopstock estate, but that there was a proper available representative of Isaac's estate, then upon its own motion it could have ordered a substitution of the party plaintiff by amendment to the complaint. Toomey v. Toomey, 13 Cal.2d 317, 89 P.2d 634. After the appeal, the case was in the identical position and condition in which it stood prior to trial. If the court had the inherent power to make such an order before trial, in the interest of justice it could, with equal propriety, do so after appeal, unless it interfered with the rights of the defendants. From an evidentiary standpoint, it does not appear from the record before us that the defendant's constitutional rights will be diminished or infringed upon in this action for fraud by the appearance of the real and proper legal opponent as party plaintiff.

[5-7] If the rights of parties are finally adjudicated upon appeal, as for instance in the establishment of the law of a case, by the court giving a direction to the trial court to enter a specific judgment or decree, the trial court is without authority to permit amended or supplemental pleadings. Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795. It is the duty, however, of the court to determine completely any legal controversy between parties when it can be done without injustice to the rights of others, and where the determination requires the addition of parties plaintiff or defendant, amended, supplemental or additional pleadings may be filed upon motion of either party, or an intervening party, or upon the court's initiative if that becomes necessary, to serve the ends of justice. Code Civ. Proc., sec. 389. This rule is mandatory if the record shows that a correct determination cannot be had without the presence of other or additional parties (Ambassador Petroleum Co. v. Superior Court of Los Angeles County, 208 Cal. 667, 284 P. 445), and amendments to pleadings are to be liberally permitted providing the amendment does not state a different cause of action. Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077. It is immaterial whether the motion for the order be made by one litigant or the other, or by a previously unrepresented party as an intervener, or by the court of its own motion, so long as the amendment tends to a complete determination of the rights and interests of all parties concerned and does not contribute to the injury of others.

[8-11] An order granting relief by the addition of parties plaintiff or defendant is remedial in its nature and will not be disturbed upon appeal unless it appears that there was an abuse of the court's discretionary powers. Hammond Lumber Co. v. Gilky, 120 Cal.App. 252, 7 P.2d 724; Nuckolls v. Bank of California, 10 Cal.2d 266, 74 P.2d 264, 114 A.L.R. 708. The added or substituted party's willingness to appear is a circumstance to consider (Tuller v. Superior Court, 215 Cal. 352, 10 P.2d 43), but "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then

order them to be brought in". Code Civ. Proc., sec. 389. The provision is mandatory and the order directing the addition of an indispensable party may be made at any time (Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163) and may be made upon the court's own motion. Loock v. Pioneer Title Ins., etc., Co., 4 Cal.App.2d 245, 40 P.2d 526; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Gates v. Lane, 44 Cal. 392; Robinson v. Gleason, 53 Cal. 38; Rabe v. Western Union Tel. Co., supra; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Merchants' Trust Co. v. Bentel, 10 Cal.App. 75, 101 P. 31; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236.

In Landis v. First National Bank, 20 Cal.App.2d 198, 207, 66 P.2d 730, 734, the court said: "* * * the general rule is that beneficiaries may not prosecute actions for the recovery of property belonging to the estate, and that it is the duty of the executor or personal representative to do so. This rule has its exceptions. In 23 Corpus Juris, p. 1193, § 426, we find the rule thus stated: 'While the personal representative is the proper person to proceed for the recovery of assets of the estate, it is held that the beneficiary may prosecute claims where the personal representative cannot or will not act, or where the personal representative himself, by collusion with the debtor, or otherwise, obstructs the natural course which the law establishes for the transmission of the estate to the heirs.'"

[12] Admitting that facts in the Landis case are different from those in Samter v. Klopstock, supra, we cannot hold that it was error to call the trial court's attention after appeal to the fact that at the time of filing the Samter action, one of the defendants (Frederick) was the sole surviving executor of the Isaac Klopstock estate and therefore unavailable as a plaintiff, but that subsequently one Flora E. Short had been appointed administratrix of Isaac's estate and was in a position legally to prosecute as plaintiff. In fact Samter, as the representative of an heir or legatee, in his motion to amend the pleadings, was simply carrying out, in substance, the direction in Samter v. Klopstock, supra, 31 Cal.App.2d at pages 536, 537, 88 P.2d at page 253 that "If the executor or administrator of the deceased stockholder refuses to exercise such rights or stands in an adverse position, the remedy of the heir or legatee or the representative of such heir or legatee is to seek the removal or suspension of the executor or administrator and the appointment of a special administrator with power to conduct the litigation. 11B Cal.Jur., p. 869, sec. 1343."

In De Olazabal v. Mix, 24 Cal.App.2d 258, 74 P.2d 787, wherein a former wife brought suit upon certain promissory notes, the answer set forth that the notes were executed and delivered to plaintiff in trust for a minor daughter and that plaintiff could not prevail because she sued in her individual name and not in the representative capacity of trustee. The court, 24 Cal.App.2d at pages 261, 262, 74 P.2d at page 788, said: "However, a mere reading of the record before us at once indicates that during the trial of this action it developed that the purpose of the same was, among other things, to determine the rights as between the trustee and the beneficiary, and the latter, therefore, should have been brought in as a party. In this connection, the provision of section 389 of the Code of Civil Procedure is mandatory. This necessity of making all persons parties in actions under the trust where the relations of the trustees and beneficiaries are involved is in effect the rule laid down in this state in McPherson v. Parker, 30 Cal. 455, 89 Am.Dec. 129, O'Connor v. Irvine, 74 Cal. 435, 444, 16 P. 236, and Mitau v. Roddan, supra. Where, as in the instant case, it admittedly appeared to the court that it was essential to a full and complete determination of the controversy before it that the minor daughter of the parties, who was the beneficiary under the trust, should be made a party, it was the imperative judicial duty of the court to order her brought in. As was said by our Supreme Court in Mitau v. Roddan, supra, 'It was not a matter of discretion but of duty for the court, even upon its own motion, to require their presence.'"

In McPherson v. Parker, 30 Cal. 456, 457, 89 Am.Dec. 129, the court said: "It is a principle of equity jurisprudence that where a decision is made upon any particular subject matter, the rights of all persons, whose interests are immediately connected with that decision and affected by it, shall be provided for, as far as they reasonably may be." In O'Connor v. Irvine, supra, 74 Cal. at pages 443, 444, 16 p. at page 239, the court said: "If the necessary parties to a full determination are not before the court it is the duty of the court on its own motion to order them brought in; and this, al-

though the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment. Osterhoudt v. Board of Supervisors, 98 N.Y. 239; Settembre v. Putnam, 30 Cal. [490] 498; Gates v. Lane, 44 Cal. [392] 396; Barb.Parties, 319."

In Ginsberg Title Co. v. Faraone, 99 Cal. App. 381, 278 P. 866, a demurrer was interposed upon the ground of plaintiff's lack of capacity to sue. It was held that the demurrer was good, but the trial court in that case was directed to allow the complaint to be "again amended". Curtis v. Nye & Nissen, 86 Cal.App. 507, 261 P. 747; Walsh v. Decoto, 49 Cal.App. 737, 194 P. 298; Reardon v. Balaklala Consol. Copper Co., C.C., 193 F. 189. See, also, American Bank v. Port Orford Cedar Products Co., 140 Or. 138, 12 P.2d 1014; Norton v. Ferguson, 203 Iowa 317, 211 N.W. 417; Turner v. Noble, 211 Mo.App. 656, 249 S.W. 103; Atlas Assur. Co. of London v. Fairchild, 171 Okl. 609, 43 P.2d 482; McDonald v. State of Nebraska, 8 Cir., 101 F. 171; Van Camp v. McCulley, 88 Ohio St. 1, 104 N.E. 1004.

Petitioners cite a number of cases, including Lial v. Superior Court, supra; Alpers v. Bliss, 145 Cal. 565, 79 P. 171, and Argenti v. City of San Francisco, 30 Cal. 458. They make the mistake of assuming that the controversy out of which this petition arises is between the plaintiff under any name, Samter or otherwise, and the Klopstock Company and certain shareholders. As a matter of fact it is not. The original action was brought by the executor of an heir and legatee of a deceased shareholder of the Klopstock Realty Co., for the benefit of the corporation, against the company, named as defendant because the corporation would not bring an action in its own behalf, and its alleged dominating directors or shareholders. The motion to amend is primarily to bring in the administratrix of the estate of such deceased shareholder, not a stranger, but one essentially necessary to the determination of the action. Alpers v. Bliss, supra.



In Argenti v. City of San Francisco, supra, relied upon by petitioners, considerable confusion arose relative to a judgment upon a former appeal and in connection with certain statements made by justices with reference to a petition for rehearing. As an introduction to the decision, the court, 30 Cal. at page 461, said: "The first question is, what was the judgment of this Court on the former appeal?" The former order was "Judgment reversed and cause remanded." The court held (30 Cal. at page 462): "The judgment of the Court below was reversed. The consequence of a simple reversal usually is, that 'the parties in the Court below have the same right which they originally had'. (Phelan v. San Francisco, 9 Cal. [15], 16; Stearns v. Aguirre, 7 Cal. 443.) But the reversal may practically end the controversy, and when such is the case it is usually accompanied by an order dismissing the action." In the Argenti case the formal order was apparently confused with the portion of the original opinion (Argenti v. City of San Francisco, 16 Cal. 255, 275), wherein the court said: "Our conclusion is, that the right of the plaintiff to recover is limited to the amount specified in the contracts to which we have referred, and legal interest upon such amount. The judgment is for a larger sum than the plaintiff is entitled to recover, and must, therefore, be reversed. Upon the return of the cause, the Court below will render a judgment in accordance with this opinion." In the light of the foregoing, the Argenti case ceases to be of assistance to the contention of the petitioners herein, that the reversal in the present case ended the controversy.

The alternative writ is discharged. The petition for a peremptory writ of mandate to compel the respondent court to dismiss the action so far as it relates to David Klopstock, whose judgment is final, is granted. It is denied as to Frederick Klopstock, Samuel Klopstock and the Klopstock Realty Co., a corporation.

We concur: PETERS, P. J.; GOODELL, Justice pro tem.

37 Cal.App.2d 160

**BARD v. KENT et al.**

**Civ. 12394.**

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1940.

Hearing Denied April 4, 1940.

**1. Evidence ⇐445(1), 465**

The parol evidence rule has no application where the matters with reference to which writings made provision have been disposed of by an executed oral agreement. Civ.Code, § 1698.

**2. Contracts ⇐238(2)**
**Evidence ⇐445(2)**

Where owner conveyed land to trustee under subdivision trust and employed agent to sell tract on commissions payable out of purchase price of lots sold and thereafter pursuant to oral agreement agent was allowed commissions on three lots conveyed by the trustee to the owner, which commissions were applied on purchase price of two lots conveyed to the agent, and oral agreement was fully executed in every respect, oral agreement was binding on parties and parol evidence rule was inapplicable. Civ.Code, § 1698.

**3. Contracts ⇐248**

In action for difference between price fixed by subdivision trust and appreciated value of lots conveyed by trustee to agent, evidence that oral agreement between agent and owner to convey lots was made and executed rebutted presumption of fraud and required judgment of nonsuit.

---

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Ben Bard, special administrator, with general powers, of the estate of Ruth Roland Bard, deceased, against L. E. Kent and others for damages resulting from charging of certain commissions claimed by defendant under a subdivision trust and oral agreement with decedent. From a judgment of nonsuit and a judgment for the defendant, plaintiff appeals.

Affirmed.

Jerome H. Kann, of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Ruth Roland married the defendant herein in 1917 and divorced him in 1919. Notwithstanding said incident, the defendant was actively engaged as her agent from 1911 until her decease in 1937.

Decedent was the owner of a large tract of land which, by virtue of her conveyance and indenture in 1924, constituted the corpus of a sub-division trust. Simultaneous with the creation of said trust, decedent employed defendant as her agent to sell the said tract and to act as her attorney in fact in all matters pertaining to said trust. As compensation, she agreed to pay defendant a commission of ten per cent of the selling price of the parcels of the subdivision, payable out of the initial payments on the purchase prices of the lots as sold, which were to be no less than twenty per cent of the list prices as set forth in said contract of employment. In addition to said commission, for acting as decedent's attorney in fact, defendant was to receive an additional compensation of two and one-half per cent of the selling prices. The enterprise was evidently a success for the lots were all sold to other parties except those hereinafter mentioned. Upon the qualification of the plaintiff as special administrator of the estate of said decedent, he discovered that in 1925 lots 3 and 4 of said tract had been sold to a Mrs. Sheppard but that the contracts of sale had been immediately assigned to the defendant.

Upon the hypothesis that defendant was acting at all times in a fiduciary relation to decedent in the sales and disposition of said land, from his employment until 1929, and that he had concealed the facts from decedent, plaintiff instituted this action and alleged two causes, in substance as follows: (1) that, without disclosing the facts to decedent, the defendant notified the trustee that there was due him a commission of $20,984.38 for the sale of lots A, B and C, and that said trustee should apply $17,080 of said sum to the purchase price of said lots 3 and 4, and to credit his account with the balance; that the said trustee followed the instructions of defendant, credited him with $20,984.38, conveyed to him said lots 3 and 4, and charged his account with the said $17,080, leaving to his credit the balance; that in truth defendant was entitled to no commission upon said lots A, B and C; (2)

his second cause of action was that the said $17,080 applied to the purchase price of said lots 3 and 4 was the original price fixed at the time of the execution of the trust indenture; that at the time they were conveyed to defendant in 1929 their value had increased to $28,080; that defendant should restore $11,000, the difference between the fixed and said appreciated value.

The answer denied the fraud alleged; pleaded the statute of limitations and alleged decedent's complete knowledge of all acts done by defendant with reference to said commissions on the sales of said lots A, B and C and of the conveyance by the trustee to defendant of said lots 3 and 4, and that said acts were the consummation of an oral agreement between decedent and defendant in 1929.

For sufficient cause, the court granted a nonsuit as to the second cause of action. Upon ample evidence, the trial court found all the facts as alleged by the defendant and concluded that plaintiff was barred by the statute of limitations and was estopped by the acts and conduct of decedent from asserting the claim set forth in the first cause of action. From judgment of nonsuit and the judgment entered upon said findings, the plaintiff appeals on the following propositions: (1) that the real estate broker is not entitled to commissions upon the list prices of lots, constituting the residue of a subdivision trust estate, where such lots are reconveyed to the trustor, and where the brokerage contract provided for the commissions to be payable out of the initial payments of the purchasers; (2) parol evidence is incompetent to contradict a written instrument; (3) that a nonsuit is improperly ordered where the law presumes the transaction fraudulent; (4) that estoppel and limitation are not available to an agent against his principal when the principal had no knowledge of all the facts and the agent had suffered no detriment.

Prior to February, 1929, said trust was in a condition to be closed. Decedent and defendant oftentimes had discussed plans for its termination. On February 7th, 1929, decedent and defendant orally agreed that said lots A, B and C should be conveyed to decedent; that defendant should be allowed his stipulated commissions of $20,984.38 the same as though an actual sale had been made to a stranger; that $17,080 thereof should be applied to the full purchase price of said lots 3 and 4 which should be conveyed to defendant. Pursuant to said oral agreement, the trustee was authorized to and did convey said lots A, B and C to decedent and said lots 3 and 4 to defendant. After effectuating said transfers, defendant took possession of said lots 3 and 4 and made improvements thereon. A real estate office building was moved on to lot 3 and thereafter decedent paid defendant $100 per month as rental for the use of a portion of said office building. He constructed a two-story building upon lot 4 in 1936 with the approval and in the view of decedent. Prior to said construction, defendant had applied to the city of Los Angeles for a variance of the zoning restrictions upon said lots. In his application he asserted that he was the owner, and decedent, as an adjoining property owner, signed said application on the same page bearing the signature of defendant. During the life of the trust, from 1924 to 1929, the trustee forwarded periodical statements of the condition of the trust to decedent, one of which statements disclosed the transfer of said lots A, B and C to decedent and the credit to defendant of his usual commission provided by his contract of employment. All of the taxes and assessments upon said lots 3 and 4 were paid by defendant after 1925.

[1, 2] As to the first contention of the plaintiff, it is answered by the facts which disclose that the original agreement, providing for the defendant's commissions, was disposed of by an executed oral agreement. The parol evidence rule has no application where the matters, with reference to which the writing made provision, have been disposed of by an executed oral agreement. That rule was conceived for the purpose of protecting the integrity of executory writings. Any contract in writing may be altered by an executed oral agreement. Civ.Code § 1698. The oral agreement of decedent and defendant in 1929 providing for his commissions on said lots A, B and C and for the conveyance to him of said lots 3 and 4 was fully executed in every respect. It is binding upon them and their successors and the parol evidence rule is inapplicable. Fuller v. Mann, 119 Cal.App. 568, 6 P.2d 999; Klein Norton v. Cohen, 107 Cal.App. 325, 290 P. 613.

[3] The presumption of fraud urged as a basis for the $11,000 damages wholly failed in the face of satisfactory evidence to the contrary. Plaintiff's insistence that

the defendant failed to disclose that lots 3 and 4 had appreciated in value at the time of said oral agreement in 1929 is likewise disposed of by the facts which were found to be true. The court having found that an oral agreement was made and executed for the transfer of said lots 3 and 4 to defendant at the price agreed upon, the claim for damages was without any foundation and the judgment of nonsuit was necessarily entered. There was no basis for applying said presumption after decedent and defendant had consummated their agreement for the transfers of said lots and for the allowance of said commission.

The other points are disposed of by the foregoing.

The judgments are affirmed.

We concur: WOOD, J.; McCOMB, J.




37 Cal.App.2d 140

## PEOPLE v. BUTTERFIELD.

Cr. 1713.

District Court of Appeal, Third District, California.

Feb. 2, 1940.

As Modified on Denial of Rehearing Feb. 17, 1940.

**1. Criminal law ⇐997**

The "writ of coram nobis" lies to correct an error of fact as distinguished from an error of law where no statutory remedy for the wrong exists, or when the statutory remedy is inadequate.

[Ed. Note.—For other definitions of "Writ of Error Coram Nobis," see Words & Phrases.]

**2. Criminal law ⇐997**

Where an accused is deprived of the right of trial by jury by extrinsic fraud, misrepresentation, coercion, or wrongful persuasion, which neither a demurrer nor motion in arrest of judgment will reach, "writ of coram nobis" may lie, but when wrong complained of has been once presented on appeal from judgment, writ will not lie to again review same matters.

**3. Criminal law ⇐997**

Where accused alleged that he was persuaded to plead guilty by misrepresentation of a witness who was acting as a stool pigeon for officers to procure that result, there was "extrinsic fraud" which could not be reached either by a demurrer or motion in arrest of judgment, and no appeal having been taken, "writ of coram nobis" to set aside conviction and to permit accused to withdraw plea of guilty and enter plea of not guilty with privilege of trial by jury, was a proper remedy.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words & Phrases.]

**4. Criminal law ⇐997**

In California, the office of the writ of coram nobis is exercised by a mere motion to set aside a judgment after the time for appeal has expired and the judgment has become final.

**5. Criminal law ⇐997**

Where court appointed 76-year old attorney to defend accused charged with first degree murder and accused could with difficulty confer with attorney because of attorney's deafness, and attorney was unaware that person purporting to represent district attorney assured accused that if he pleaded guilty he would be sentenced for no higher crime than manslaughter and accused after pleading guilty was sentenced for first degree murder, and where accused did not discover that he had a remedy for the wrong until several months had elapsed, lapse of ten months did not constitute such "laches" as would bar proceeding in nature of a writ of coram nobis to set aside conviction.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

**6. Criminal law ⇐1159(3)**

Where the evidence is conflicting on essential issues in proceeding on coram nobis, the reviewing court will not disturb the order of the trial court refusing to set aside the judgment.

**7. Criminal law ⇐274**
**Jury ⇐31(11)**

Where accused was induced by a fellow prisoner purporting to represent district attorney to enter a plea of guilty to a first degree murder charge, on assurance that he would not be convicted of an offense greater than manslaughter which the evidence authorized, and accused on plea of guilty was convicted of first degree murder, fraud and

undue influence which person procuring plea of guilty exercised deprived accused of right of trial by jury, and conviction was set aside and accused permitted to withdraw plea of guilty and to enter plea of not guilty with privilege of trial by jury.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Proceeding in the nature of a writ of coram nobis by Fred Butterfield to vacate a conviction of murder of the first degree and to permit him to withdraw his plea of guilty and enter a plea of not guilty with the privilege of trial by jury. From an order denying the application, petitioner appeals.

Reversed with directions.

W. H. Hazell, of Lakeport, and Elliott, Vedder, Sullivan & Dunham, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a proceeding in the nature of a writ of coram nobis. The defendant has appealed from an order refusing to vacate and set aside a judgment of conviction of murder of the first degree and to permit him to withdraw his plea of guilty and enter a plea of not guilty with the privilege of a trial by jury. The attorney-general has moved to dismiss the appeal on the grounds that the petitioner waived his right to a writ of coram nobis by failing to appeal from the judgment of conviction within the time allowed by law, and that he is guilty of laches in waiting ten months before moving to set aside the judgment.

The petitioner was charged by an information filed in the superior court of Lake county with murdering one Abraham L. Lee, on August 18, 1938. He voluntarily surrendered to the authorities on September 1, 1938, and was placed in jail at Lakeport and transferred ten days later to a cell with a prisoner by the name of England who was serving sentence for passing a fictitious check. The petitioner first pleaded not guilty to the charge of murder. Subsequently he was permitted to withdraw that plea and enter a plea of guilty. In the verified affidavit which he filed on this proceeding, he claims that he was persuaded to enter a plea of guilty by his cell mate, England, who told him that he represented the district attorney with authority to assure him that if he pleaded guilty to the charge he would be punished for no higher offense than that of manslaughter. The petitioner was without means to pay for a defense, and the court appointed an attorney to represent him. But the appellant did not tell his lawyer of the assurance which he had been given that he would be punished for no higher offense than that of manslaughter. After the plea of guilty had been entered, the court took testimony, from which it determined that the accused was guilty of murder of the first degree, and thereupon sentenced him to imprisonment at San Quentin State Prison for the period of his life.

[1-4] The writ of coram nobis lies to correct an error of fact, as distinguished from an error of law, when no statutory remedy for the wrong exists or when the statutory remedy is inadequate. People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; 27 Cal.Law Rev. 228. When a defendant is deprived of the right of trial by jury, by extrinsic fraud, misrepresentation, coercion or wrongful persuasion, which neither a demurrer nor a motion in arrest of judgment will reach, the writ may lie. It is also true that when the wrong complained of has been once presented on an appeal from the judgment, the writ will not lie to again review the same matter. People v. Reid, supra. In the present case the petitioner claims he was persuaded to plead guilty by the misrepresentation of England, who was acting as a stool pigeon for the officers to procure that result. The fraud of England was extrinsic. Neither a demurrer nor a motion in arrest of judgment was available. No appeal from the judgment was taken. We therefore assume the writ of coram nobis, under such circumstances, is a proper remedy. People v. Miller, 114 Cal. 10, 45 P. 986; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Bostic, 167 Cal. 754, 755, 760, 141 P. 380; People v. McCrory, 41 Cal. 458. In California the office of the writ of coram nobis is exercised by a mere motion to set aside a judgment after the time for appeal has expired and the judgment has become final. People v. Mooney, supra.

[5] Under the circumstances of this case we are of the opinion the petitioner is not barred from prosecuting this writ by lapse of time or by laches. Upon his arraignment the court appointed a lawyer 76 years of

age, who was deaf and inexperienced in the practice of criminal law. The petitioner was able to discuss the proceedings in his case with his attorney with great difficulty. His lawyer was not able to hear with any degree of accuracy the proceedings which occurred in open court. He was not aware of the conduct of England. After the petitioner's plea of guilty and the court's determination that he was guilty of murder of the first degree, he was immediately taken from the court room and transferred to San Quentin within two days thereafter. He did not have the opportunity to thereafter confer with his attorney about the deceit of England. He was astonished and stunned by the unexpected finding of murder of the first degree. It was not until several months later, when his brother, for the first time, learned of England's fraud, and chanced to consult with his own attorney, that it was discovered there might be a remedy for this wrong by coram nobis. Under such circumstances, in the interest of justice, we are of the opinion the lapse of ten months should not bar the petitioner from the right to maintain this action.

The motion to dismiss the appeal is denied.

[6, 7] It is true that when the evidence is conflicting on the essential issues in a proceeding on coram nobis, a reviewing court will not disturb the order of a trial court refusing to set aside a judgment. People v. Davis, 187 Cal. 750, 203 P. 990. In the present case, however, with the exception of a single inference which has little weight there is no substantial conflict on the chief issue regarding the false representations and fraud of England in persuading the petitioner to plead guilty to the charge of murder. It is true the district attorney testified he did not authorize England to secure the petitioner's plea of guilty by means of a promise that he would not be punished for any offense higher than that of manslaughter. We assume the district attorney did not authorize England to make that promise. Certainly the district attorney could not bind the court to such a promise. The evidence seems clear, however, that the district attorney, the sheriff and England operated together "to secure a confession" of guilt from the accused. The sheriff failed to testify that he did not authorize England to make that promise to the petitioner. The district attorney admitted that petitioner was placed in a separate cell by himself for ten days after he surrendered to the officers; that England proposed to him and to the sheriff that if they would place the petitioner in a cell with him, he might secure a confession from him; that the officers consented to that proposal, and Butterfield was placed in a cell with England for that purpose; that England was furnished a Penal Code, which, it is conceded, he used to good purpose in aiding him to persuade the petitioner to plead guilty; that the statement of the petitioner was afterwards taken by the district attorney in the sheriff's office in the presence of the two officers and England. The presence of England at that hearing indicates he was acting as a stool pigeon. The petitioner positively testified that England told him he represented the district attorney and that he was authorized to promise him that if he pleaded guilty to murder he would not be punished for any offense higher than that of manslaughter. That statement of the petitioner is not contradicted. He was not called as a witness, although he was then on probation subject to order of the court, and his whereabouts should have been easy to discover. The failure to procure his presence and to leave undisputed so serious a charge of fraud is unfortunate. The effective use of a fellow prisoner, under the circumstances disclosed by this case, to aid in inducing an accused person to plead guilty to the serious crime of murder which might carry with it the death penalty, should be critically scrutinized to be very sure that a great wrong has not been inflicted.

After procuring the written statement of the accused, the preliminary hearing occurred. He was fairly informed of his legal rights, but it is doubtful if he appreciated the force of that advice. He was not then represented by counsel and he was financially unable to employ any. He took the witness stand and freely related his story of the entire affair, which sounds very plausible. If his story is true he acted in self-defense in striking the deceased. At most, his conduct, as related by him, would amount to no more than manslaughter. There is but a single circumstance, afterwards related by the coroner, which creates any possibility that the petitioner struck the deceased with premeditation, deliberation or malice aforethought. That circumstance may reasonably be reconciled with his innocence of murder and his expectation that he would be punished for manslaughter only. The record seems to refute the possibility of his having acted with premeditation or malice. The entire record corroborates his story in

the main which convinces us that the homicide was merely the result of a sudden drunken quarrel and an unintentional killing, inducing the petitioner to honestly believe he was guilty of no higher offense than manslaughter and that if he accepted England's advice to plead guilty he would not be punished for any greater offense. His story is practically undisputed, with the exception of outturned pockets of the deceased. There was no eye-witness to the affray other than the deceased and the accused. It is unreasonable to assume there was any motive for him to have deliberately killed a poor migrant fruit picker without means and with whom the petitioner has been on the best of terms. If the deceased had possessed any money or property worth stealing it would have been easy for the prosecution to have proved that fact by bartenders from whom liquor was procured, or by his companion who occupied the camp with him by the riverside at the outskirts of Kelseyville. That was not done. None of these men were called as witnesses. It appears that a grave injustice may have been inflicted on the petitioner by procuring him to plead guilty through the influence of England.

The facts show that the petitioner, a young man of previous good character for peace and quiet, had resided for several years with his parents three miles from Kelseyville. Six witnesses, including a physician of local prominence, testified that he was industrious, reliable and peaceable. He had never been in any other serious trouble except on one occasion when he was arrested on a charge of theft of an automobile under section 503 of the Vehicle Code (St. 1935, p. 174), although he did occasionally drink to excess. He was a laboring man and a painter. He had a savings account of $54 and additional cash in the sum of about $28. The deceased was an itinerant fruit picker, in poor health, who lived with a partner in an improvised camp on the margin of Kelsey Creek near Kelseyville.

The evening before the homicide the petitioner met Abraham Lee in Kelseyville. They had not been previously acquainted. They spent the evening associating on the the friendliest of terms, drinking beer together in local saloons. There is absolutely no evidence of any quarrel or ill-will between them until the sudden dispute over a trivial incident which occurred at the time of the affray. Both of them were under the influence of liquor. After midnight they started toward their respective homes together. The deceased was carrying a loaf of bread. Neither of them was armed with a weapon. They followed the roadway which paralleled the creek at a distance of about twelve feet. The petitioner stepped on a stone and stumbled against the deceased. Mr. Lee became angry and abused the petitioner, striking him with such force as to knock him down. The petitioner arose and struck back at the deceased, knocking him down. In response to a direct inquiry, the accused admitted that he did not know whether he struck the deceased with his fist or with a stick or stone. This story refutes the theory of preparation or premeditation for the assault. The petitioner says he was stunned by the unexpected result of his blow. The body of the deceased indicated no evidence of violence except a bruise over the right eye and temple. The skull was not fractured. There was a clot of blood beneath the skin. He may have fallen on a rock. The petitioner walked away a distance of 200 feet or more, when he realized the deceased might be seriously injured. He returned and examined the body. Then he dragged it off the roadway about twelve feet to an open space between two clumps of willow trees on the margin of the stream, and sparsely covered the body with some dry willow branches. He then proceeded to his home. He drew his money from the bank and went to Santa Rosa, thence to San Francisco, and later to Bellingham, Washington. In ten or twelve days he returned to his home. Upon learning that the officers were looking for him, he voluntarily surrendered himself into their custody. An investigation was made and the charge of murder was filed against the petitioner some fifteen days later.

The body of the deceased was not discovered until about ten days after the homicide was committed. The coroner testified that when he first saw it, the pants' pockets were pulled out. The petitioner positively declared that he did not feel in the pockets of the deceased. That is the only circumstance which gives any color to the assumption that Mr. Lee might have been killed by the petitioner with robbery as the motive. It seems unreasonable to believe an impecunious person would be killed for that reason. The theory of murder under the circumstances of this case does not seem reasonable. But the motive for striking the deceased, which unfortunately resulted in his death, is important only for the purpose of throwing light on the question of whether

the petitioner pleaded guilty as a result of the fraudulent inducement of England, leading him to believe he would be punished for no higher offense than that of manslaughter.

It was assumed the petitioner's flight furnished some evidence of his guilt. That is true. But it does not necessarily furnish evidence of the degree of the crime of which he may be guilty. It is some evidence that one thereby seeks to avoid prosecution for violating the law. It is some evidence of the commission of the homicide, but it is entitled to little weight in support of the theory that it was perpetrated with premeditation, deliberation or malice aforethought. Regardless of the crime of which the petitioner may be guilty, the fraud and undue influence which it appears that England exercised to induce the petitioner to plead guilty is not justifiable, for it wrongfully deprived him of the right of trial by jury.

The order is reversed and the court is directed to permit the petitioner to withdraw his plea of guilty and to enter a plea of not guilty with the privilege of a trial by jury if he so desires.

We concur: PULLEN, P. J.; TUTTLE, J.




37 Cal.App.2d 252

## WICKLUND v. PLYMOUTH ELEMENTARY SCHOOL DIST. et al.

Civ. 6235.

District Court of Appeal, Third District, California.

Feb. 10, 1940.

**1. Schools and school districts ⇐115**

An injured student, failing to file verified claim against school district for damages with district clerk within 90 days after accident, as required by statute, cannot recover damages from district, though she was physically and mentally incapable of presenting claim during such period because of severity and continuing effect of her injuries and extent thereof was not ascertainable until after such time. School Code, § 2.801, as amended by St.1937, p. 414.

**2. Schools and school districts ⇐115**

A claim against school district for personal injuries must be filed within 90 days after date of accident, not from date when full result of injuries was ascertained or date of recovery therefrom, though claimant was physically incapacitated during such period and injuries were continuous. School Code, § 2.801, as amended by St.1937, p. 414.

**3. Action ⇐34**

Where a right of recovery is clearly statutory and granted on conditions, one seeking to enforce right must bring himself clearly within such conditions by allegation and proof.

**4. Constitutional law ⇐70(1)**

Whether holding that injured student, failing to file verified claim against school district for damages with district clerk within time required by statute, cannot recover damages from district, though physically and mentally incapacitated to present claim during such period, results in injustice and is too onerous is matter of legislative concern, not judicial interpretation. School Code, § 2.801, as amended by St.1937, p. 414.

---

Appeal from Superior Court, Amador County; J. T. B. Warne, Judge.

Action by Helen Wicklund, by her guardian ad litem, A. Wicklund, against the Plymouth Elementary School District and the trustees thereof to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals.

Affirmed.

Gumpert & Mazzera, of Stockton, Snyder & Snyder, of Jackson, and J. Calvert Snyder, of Stockton, for appellant.

Allen L. Martin, Dist. Atty., of Jackson, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought to recover damages on account of personal injuries. The trial judge sustained a demurrer to the complaint, without leave to amend, and judgment was entered in favor of defendants. From this judgment plaintiff prosecutes the appeal.

[1] The complaint alleges that plaintiff was a student in Plymouth School, and that, through the negligence of defendants, her dress became ignited and the resulting fire caused her serious and dangerous burns.

The allegation with which we are here concerned reads as follows:

"That, while said burns were received, as herein alleged, on January 4, 1938, the effect thereof covered a continuing period, and from January 4, 1938, to August 3, 1938, as a result thereof, plaintiff was confined in a hospital, and, during such period, because of the severity and continuing effect of such injuries, plaintiff was neither physically nor mentally capable of having presented her said claim to the clerk of said School District, and that due to the continuing effect of such injuries, it was not until after August 3, 1938, that the extent thereof was ascertainable, and hence, the delay in presenting said claim to said clerk."

The right of action is predicated upon section 2.801 of the School Code, as amended by St.1937, p. 414, which reads as follows: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees; provided, however, that a verified claim for damages shall have been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

It is contended by appellant that, although it appears that a verified claim was not filed within ninety days after the accident, the complaint alleges facts which, nevertheless, entitle plaintiff to recover. Those facts appear in the portion of the complaint quoted above.

We are of the opinion that the case of Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580, 581, is squarely against the position taken by appellant, and is decisive of the question here raised. In that case the question was based upon a similar statute relating to actions against municipalities. Plaintiff did not present her claim for damages within the ninety days required, and as an excuse for noncompliance, alleged in her complaint as follows: "That plaintiff, by reason of her injuries was incapacitated and sick and sore in mind and body for a period of three months and unable to ascertain the true state of the law and the nature of her rights, and unable to file a claim against said city."

A demurrer was sustained to the complaint, and judgment was entered for defendants. After stating that there is a line of cases which hold that provisions of a law requiring the giving of a notice of injuries within a specified time need not be strictly met, the court said: "The contrary, and we think the more satisfactory, rule is that the giving of notice or the filing of claims within the limited period allowed therefor is purely a matter for legislative control, and that where a law makes compliance mandatory and no exceptions are provided in the law itself, the courts may provide none under the guise of interpretation or construction." (Numerous cases are cited.)

[2, 3] It is contended by appellant that the allegations here can be distinguished from those in the Johnson case, as they show a continuous injury, the extent of which was not ascertainable until "after August 3, 1938", and that therefore the ninety-day period did not commence to run until that date was reached. We do not think this attempted distinction is substantial. The statute makes no exception whatever, based upon the physical incapacity of the claimant during the said period. Whether the injury is continuous or not, is immaterial. The claim must be filed within ninety days from the date of the "accident", irrespective of the nature of the injuries received. This does not mean ninety days from the date when the full result of the injuries were ascertained, or from the date of recovery from such injuries. It is a familiar rule that where a right of recovery is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself clearly within the conditions. Johnson case, supra.

[4] It is true, as pointed out by appellant, this holding may, in some cases, work a real hardship. If it does result in an injustice and is too onerous, that is a matter of legislative concern, and not judicial interpretation. The complaint shows that appellant failed to file her claim within the time provided by the School Code, and hence it did not state a cause of action.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

**STEPHENS v. CLARK, Director of Motor Vehicles, et al.***

**Civ. 6287.**

District Court of Appeal, Third District, California.

Feb. 8, 1940.

Hearing Granted April 8, 1940.

**1. Officers ⇐100(1)**

Where investigator for department of motor vehicles entered the service in 1932 and became a civil service employee when constitutional provision became effective on December 20, 1934, neither order of personnel board on September 4, 1935, changing name of position, nor order of November 7, 1935, establishing minimum and maximum salary for the position generally, was effective to change the salary of employee from amount previously received. St.1927, p. 1314, § 5; Const. art. 24, adopted in 1934.

**2. Officers ⇐100(1)**

The tenure and right to salary of civil service employee occupying position which had theretofore been exempt from civil service became fixed after he had served probationary period of eight months and employee held his position under "original classification" within statute exempting persons holding positions under "original classification" from operation of provision authorizing commission to grade positions and to establish minimum and maximum salary limit, so that where salary of employee was reduced to maximum fixed by personnel board for position generally, he was entitled to recover difference between that amount and amount theretofore received. St.1927, p. 1314, § 5; Const. art. 24, adopted in 1934.

**3. Officers ⇐100(1)**

The power to change the salary of civil service employees must be carefully guarded, since as a practical matter the right to reduce salaries is the right to discharge.

**4. Limitation of actions ⇐6(10)**

Proceeding commenced in 1938 by civil service employee to compel payment of unpaid portions of salary allegedly earned since 1935 was not barred by limitations under statute, effective in 1937, requiring actions for salary to be brought within 90 days, in view of provision therein exempting grievances, arising prior to effective date of statute, from provisions thereof. St.1937, p. 2032, § 52.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Robert E. Stephens against Frank W. Clark, substituted for Ray Ingels, as Director of Motor Vehicles, State of California, and others to compel respondents to fix petitioner's salary as a civil service employee in the department of motor vehicles at $275, and to pay him unpaid portions of salary allegedly earned since November, 1935. Judgment for petitioner, and respondents appeal.

Affirmed.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for appellants.

Ralph H. Lewis and Fred R. Pierce, both of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner, a civil service employee in the department of motor vehicles, sought by mandate to compel respondents to fix his salary at $275, and to pay to him the unpaid portions of his salary allegedly earned since November, 1935.

In 1932 petitioner entered the service of the state in the division of registration of the department of motor vehicles, as an "Investigator", at a salary of $275 per month. Until December, 1934, this position was exempt from civil service. Section 360b, Pol.Code; Stats.1931, chap. 478, p. 1041, § 1.

On December 20, 1934, article XXIV of the state Constitution became effective and petitioner became a civil service employee subject to a probationary period of eight months, and at the end of this period he acquired the status of a civil service employee. On September 4, 1935, the personnel board classified petitioner as supervisor of nonresident registration, but did not, by this order, make any reference to his salary, and petitioner continued to receive $275 per month until November 7, 1935, when the personnel board established a range salary for the class of supervisor of nonresident registration, fixing the minimum at $205 and the maximum at $250, and after that date petitioner has received, each month, the sum of $250.

It is the contention of appellants who are members of the personnel board, the controller and the director of the department of finance, that the resolution of the per-

*For subsequent opinion see 106 P.2d 874.

sonnel board, fixing the salary range for the class occupied by petitioner (he being the only person in that class) operated automatically to fix his salary at the maximum, and also that the claim of petitioner is barred by the provisions of subdivision I of section 338 of the Code of Civil Procedure.

In support of the contention of appellants that the fixing of the salary range for the particular class automatically reduced the salary of petitioner to the maximum for the designated class, they argue that a person blanketed into civil service holds his position subject to the civil service provisions of the Constitution, save that the board may classify the positions under civil service in accordance with the duties attached to the several positions, and that within each class the commission may grade all positions with respect to salary and may establish a minimum and a maximum salary for each grade. Sec. 5, Civil Service Act; Stats.1913, p. 1035; Stats. 1927, p. 1313. They also contend that the fixing of a salary is an essential part of the classification scheme, and until a salary range has been fixed, the classification plan is not complete.

We are unable to accept the reasoning of appellants. Upon the completion of the probationary period petitioner became a permanent civil service employee with all the rights the law afforded such employees. The Civil Service Act of 1913 as amended in 1927 provided, in section 5 thereof, that the commission should grade all positions within each class with respect to salaries, and establish a minimum and maximum salary limit, and could amend, consolidate, or abolish grades and classes from time to time, but further provided that persons holding positions under the original classification or grade were not affected thereby. Stats.1927, chap. 719, p. 1314, § 5.

As pointed out by Judge Shields, the learned trial judge:

"It is clear of course that when petitioner was taken into the civil service by the Constitutional Amendment of 1934 that he came in with the salary which he was then receiving of $275.00 per month. At any time during his probationary period of eight months the Personnel Board could have had their will with his employment and his salary, but they chose to leave it as it was. Thereafter they could have changed his salary only in such way as was provided by law for action upon salaries of employees generally within the classified service. Their first action in merely grading and classifying his position generally did not of course affect his salary. When the Board in November, 1935, established maximum and minimum salaries for this position it seems clear that this action did not affect his salary. There is nothing in the Civil Service Act of 1913 which would suggest that existing salaries were to be affected by any such act. The specific provisions directing the Board to establish maximum and minimum salaries for positions in the civil service was enacted in 1927, and this amendment to the law does not state that this shall be one of its consequences. In fact the Act of 1927 after providing for salary limits for grades, and for changes of classes and grades, provided 'but persons holding positions under the original classification or grade shall not be affected thereby'. Stats. 1927, page 1314.

"It is claimed that in Raymond v. Christian, 24 Cal.App.2d 92 [74 P.2d 536], it was decided that when maximum and minimum salaries were provided for a certain class or grade of position that that of itself changed existing salaries to conform to this range. This question was not raised in that case nor discussed therein. The most that can be said of that case is that it was assumed that such newly established range so operated. The Raymond case grew out of conditions which arose prior to the passage of the Civil Service Act of 1937. Stats.1937, page 2085.

"The legislature at that time, 1937, apparently deemed that the Amendment of 1937 providing for maximum and minimum salaries did not affect existing salaries, for in its act of that year, when it wanted to provide that such an order did affect existing salaries, it did not adopt the language of the existing act, but as a new enactment specifically provided, 'Sec. 64. Upon the reclassification or reallocation of a position the status and salary of the person holding the position shall not be affected, unless his salary before the reclassification or reallocation was higher than the maximum salary prescribed for the class to which his position is reclassified or reallocated. In such event his salary shall be reduced to not less than the maximum prescribed for the class to which his position is reclassified or reallocated.' Section 70 of the same Act (Civil Service Act of 1937), provides 'Salary changes [ranges]

shall consist of minimum and maximum salary limits and employees in a particular class shall receive a salary within the limits provided for that class'. It will be thus seen that the power to fix salaries through establishing ranges of salaries was first given to the Personnel Board by the Act of 1937.

"It is significant that by the Amendment of 1937, providing for the establishment of maximum and minimum salaries, no provision is made for notice or a chance to be heard by the persons holding positions within the range which was being fixed. This was plainly upon the theory that no existing salaries were to be affected by providing for such maximum and minimum salaries. But in the Act of 1937 where that consequence was specifically given to such action by the Personnel Board, it is provided 'Reasonable opportunity to be heard shall be provided by the board to any employee affected by a change in the salary range for the class of his position.' Section 70, Stats.1937, page 2094.

"It seems clear that nothing that was done by the Personnel Board prior to the adoption of the Act of 1937, has affected the salary of the petitioner."

[1] We find no action of the personnel board that directly purports to change the salary of petitioner. Apparently not the order of the board of September 4, 1935, changing the name of the position from inspector to supervisor of nonresident registration, because nothing was said as to salary. In the order of November 7, 1935, the minimum and maximum salaries were established for the position generally, but the order itself was not addressed to petitioner, nor did it purport to affect the salary of petitioner, but was referring to a time when that position might in the future be held by one whose tenure had not been already established. In fact at that time not only did no statute authorize such a change or grant to the board the power to change the salary of any civil service employee, but on the contrary the law as it then stood expressly forbade such change, section 5 of the act holding, as noted above, that persons then holding positions were not to be affected by new salary adjustments made for positions generally.

[2] Petitioner had served a probationary period of eight months. At the end of that time his tenure and right to his salary became fixed without any further action on the part of the board, and he was holding his position under the original classification, as that term is used in section 5 of the Civil Service Act, supra.

[3] If security of tenure of the individual employee is to be secured by civil service in government, the power to change the salary of the employee must be carefully guarded, for as a practical matter, the right to reduce salaries is the right to discharge. Lotts v. Board of Park Commissioners, 13 Cal.App.2d 625, 57 P.2d 215.

In Kennedy v. State Personnel Board, 6 Cal.2d 340, 57 P.2d 486, it was held that any attempt to postpone the vesting of tenure beyond the probationary period fixed by the board was void. The board, by failing to grade or classify or fix the salary of an employee within the probationary period, could extend the period of probation to a time to suit its purpose, and by classifying the maximum so low as to almost force a resignation, thereby defeating the purpose and effect of the civil service statutes. It is such opportunity for abuse that the law seeks to remove. As said in Lotts v. Board of Park Commissioners, supra [13 Cal.App. 2d 625, 57 P.2d 219]: "That such a power would be, in the present case, in good hands, and that no arbitrary or improper action on the part of the board would result from its exercise, may be fully conceded. It is a question simply whether under the city charter and laws the power has in fact been granted, and upon a careful examination we are compelled to say we think it has not."

The plea of the statute of limitations is based upon section 52 of the Civil Service Law (Stats.1937, chap. 753) which went into effect August 27, 1937.

[4] That section provides in part that no action for back salary shall be brought unless commenced within ninety days after the claim arose. This action was commenced July 15, 1938, and appellants contend that at least seven months are barred. Section 52, supra, provides, however, "any such cause of action or complaint or ground for issuance of any complaint or legal remedy or wrongs or grievances arising prior to the effective date of this act shall be exempt from the provisions of this section". The plea of the statute is therefore not applicable under the facts of this case.

For the foregoing reasons petitioner is entitled to the relief sought. The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

37 Cal.App.2d 206

**BENDER v. PERRY et al.**

Civ. 2288.

District Court of Appeal, Fourth District, California.

Feb. 7, 1940.

**1. Trial ⇐260(8)**

In action for injuries to motorist struck by truck at highway intersection, an instruction in regard to right of way as provided by statute relating to intersections other than on through highways was properly refused where court gave defendants' instruction relating to right of way at through highway intersections, and defendants proceeded on theory that intersection was a through highway intersection. Vehicle Code, § 550(a, b), St.1937, p. 619, § 552, St.1935, p. 187.

**2. Appeal and error ⇐882(12)**

A party cannot complain of instructions given at his own request, or of instructions given which were not offered by him, but which relate to a subject matter or legal question about which he himself has offered an instruction.

**3. Appeal and error ⇐882(12), 1067**

Alleged error in giving instruction on right of way at through highway intersection and refusing an instruction on right of way relating to intersections other than on through highways was harmless, where case was tried on theory that intersection was a through highway intersection, and defendants invited alleged error by submitting instruction explaining right of way at such intersection. Vehicle Code, § 550(a, b), St. 1937, p. 619, § 552, St. 1935, p. 187.

**4. Appeal and error ⇐1066**

In action for injuries to motorist struck by truck at highway intersection, instruction that a through highway was a highway at entrance to which vehicular traffic from intersecting highways is required to stop before entering or crossing intersection when stop signs are erected as provided by law was not erroneous as permitting jury to find that street was a through highway when evidence failed to show that it was legally so designated, where case was tried on theory that street was a through highway. Vehicle Code, §§ 82.5, 471, St.1937, pp. 413, 331.

**5. Appeal and error ⇐930(1)**

Every intendment is in favor of judgment, and appellate court must view the evidence most favorably to the respondent.

**6. Automobiles ⇐206**

A motorist traveling only 3 miles in excess of prima facie limit of 45 miles per hour on through highway had right to presume that truck driver on unfavored street would stop at stop sign at intersection, would yield right of way to motorist, and would not proceed into intersection until truck driver could do so without creating a traffic hazard. Vehicle Code, § 552, St. 1935, p. 187.

**7. Automobiles ⇐245(78)**

In action for injuries to motorist traveling only 3 miles in excess of prima facie limit of 45 miles per hour on through highway when he was struck by truck at unobstructed intersection, motorist's contributory negligence was for jury. Vehicle Code, § 552, St.1935, p. 187.

---

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Ervin Bender against John P. Perry and another for injuries sustained in an automobile collision. From a judgment for plaintiff, defendants appeal.

Affirmed.

Borton, Petrini, Conron & Borton and J. K. Lilly, all of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, for respondent.

THOMSON, Justice pro tem.

This is an appeal from a judgment based upon the verdict of a jury in favor of plaintiff and respondent in an action for damages for personal injuries, property damage and loss of earnings arising out of an intersection collision which occurred on January 2, 1938, in Kern county.

At the time of the collision defendant Perry was driving a ton and a half Ford truck owned by defendant Cowart, in the course of his employment, east on Panama lane. The plaintiff was driving his Ford sedan south on Oak street, sometimes called Wible road. Oak street has pavement 25 feet wide and Panama lane has pavement 18 feet wide. The collision of these two vehicles occurred in the intersection of the paved portions of the highways. Plaintiff

testified that he was driving about 48 miles per hour as he approached the intersection. The evidence showed that defendant Perry was driving between 30 and 35 miles per hour up to a point about 200 feet from the intersection when he slowed down. Perry and his passenger, Polf, both testified that Perry stopped the truck at the boulevard stop sign near the southwest corner of the intersection. Plaintiff testified that when he first noticed defendants' truck it was about 150 feet west of the intersection, traveling about 30 miles per hour, and that it slowed to about 10 miles per hour; that it appeared as if defendant were going to stop, but, instead of stopping the truck, "came shooting out into the road, into the center of the road" when plaintiff was "right at the intersection" and within 50 feet of it. A witness who was working in a field at the southwest corner of the intersection testified that he saw the truck and it did not stop for the stop sign. Defendant Perry testified that he did not see plaintiff's car until he was in the center of the intersection, and then his passenger said "Look out", but then he did not have time to do anything to avoid the collision. The corner was not an obstructed intersection. It is open on three sides, including the side involved in this case. Defendant Perry testified that from a point 200 feet back from the intersection there was a view north on Oak street from 800 to 1,000 feet. On deposition he previously stated he could see in that direction for almost a quarter of a mile.

Appellants present two main assignments of error. In the first, appellants contend that the court erred in not giving an instruction offered by defendants in regard to the right of way as provided by section 550, subdivisions (a) and (b), of the Vehicle Code, St.1935, p. 187, as amended by St.1937, p. 619, which relate to intersections other than on through highways; and also that the court should not have given the instruction offered by plaintiff defining a "through highway". They urge in the second assignment of error that the verdict was contrary to the evidence and that contributory negligence appears as a matter of law.

Plaintiff's opening statement at the trial indicated that his charge of negligence against defendants was based in part upon the claim that Oak street was a "through highway" at its intersection with Panama lane and that, consequently, defendant Perry was required to stop his truck at a stop sign near the entrance to the intersection. Defendants offered to the court two instructions on the subject of right of way, one based on section 552 of the Vehicle Code defining the rules relating to the right of way at through highway intersections, and the other based on section 550 of the Vehicle Code setting forth the rules on the right of way applicable to ordinary or nonthrough highway intersections. All references to the Vehicle Code herein relate to the Vehicle Code which was in effect at the time of the accident. The defendants' instruction relating to the right of way at through intersections was given by the court, and the other was refused. No proof was offered at the trial to show whether or not the board of supervisors of Kern county declared Oak street to be a through highway or authorized the erection of boulevard stop signs at the intersection as provided in section 471, subdivision (b), of the Vehicle Code, St.1937, p. 331, but the uncontradicted evidence is to the effect that such signs were there at the time of the collision. Appellants contend, therefore, that under the state of the evidence, the trial court should have deleted the instruction dealing with the subject of right of way at through highway intersections, there being no evidence upon which the existence of a through highway could be found. The record discloses that throughout the trial it was the theory of plaintiff that defendants' truck did not stop at the stop sign but merely slowed down and then shot into the intersection immediately in front of plaintiff, and thus caused the accident. We believe the record also discloses that the defendants, throughout the trial, were proceeding upon the theory that defendant Perry (driver of the Ford truck) actually stopped at the stop sign, looked for traffic on Oak street and that plaintiff's car was not yet within Perry's line of vision when Perry entered the intersection, but that plaintiff's automobile came so fast that Perry was struck before he could get across the intersection.

[1] Counsel for defendants made an opening statement immediately following plaintiff's opening statement, in which defendants' counsel said in part: "* * * now, on the day in question Mr. Perry drove this truck as I have described it up to this intersection, stopped here at the boulevard stop sign, looked in both directions, first looking north, then looking south. As he looked north he looked up the road a distance of some 900 feet or so, about 300 yards, that in that distance there were no

automobiles of any kind approaching the road, the intersection. * * * Now, with respect to Mr. Bender's car we will prove that he was driving down Oak street at a speed in excess of 65 miles per hour, he was coming down that road like a cannon ball, that he was not within Mr. Perry's line of vision at the time he looked across the road, but he came so fast that he reached the intersection, struck him anyhow before Mr. Perry could get across the road * *." A diagram was used to illustrate testimony. It showed the stop signs. In objecting to a question, one of defendants' counsel said: "There is one further objection, there is no proper foundation laid here for asking this question because of the fact it hasn't been shown exactly how many feet from the boulevard stop sign that this car, this truck of the defendant did stop. In other words, the question has been asked if I recall the exact terminology 'if a car was stopped at the boulevard stop sign'. There is a great deal of discretion as far as a motorist goes, stopping at a boulevard stop sign, you don't have to stop the front wheel where the sign post is, don't have to stop exactly with the hind wheels where the sign post is. In other words, you come up to that sign post, you might stop ten feet before the stop, the boulevard stop, it would still be within the law, because coming to a stop within a reasonable distance of that boulevard stop and with that fence going down the highway to the north on Oak street would make a great deal of difference as to visibility, exactly where that truck was stopped." A written statement signed by E. C. Polf, the passenger in the Ford truck, was received in evidence without objection. Part of it is as follows: "We were going east on Panama road. There is a boulevard stop at the entrance onto Oak street. We came to a complete stop at the boulevard stop sign." An officer of the Highway Patrol was called as a witness for defendants, and one of the attorneys for defendants examined him as follows:

"Q. I will label that 'R-1.' Now you recall that this intersection is a boulevard stop intersection, officer? A. Yes, sir.

"Q. And boulevard stops are—running east and west would these small circular marks on the east and west corner of Panama lane correctly represent those boulevard stops? A. They would represent them, yes."

The record is devoid of any indication that either party at any time during the trial departed from the theory that Oak street was a through highway and that the intersection was a through highway intersection within the meaning of the Vehicle Code; or that any other theory was adopted or pursued by either party. Under such circumstances, the court was justified in concluding that defendants had proceeded on the theory that the intersection was a through highway intersection and that defendants' proposed instruction on the right of way at an intersection of highways, neither of which is a through highway, would have been inapplicable; and that defendants' instruction relating to the right of way at a through highway intersection should be given. In the case of Lindenbaum v. Barbour, 213 Cal. 277, 285, 2 P.2d 161, 164, which was an action for damages for personal injury sustained in an automobile collision, the evidence showed that appellant did not stop at a boulevard stop sign and was in the intersection when respondent's car entered it. The board of supervisors passed an ordinance declaring one of the highways involved to be a through highway, but the evidence did not disclose that said board had authorized anyone to erect the stop signs as provided in the Vehicle Code. There was some evidence to the effect that the Automobile Club erected them at the intersection. The Supreme Court said: "It is suggested that inasmuch as there was not introduced in evidence any official authorization by the board of supervisors of San Bernardino county to any one to erect the stop sign at the intersection in question, that the stop sign was without legal significance and the defendant was under no duty to stop at such stop sign. The only testimony in the record with reference to the erection of the stop sign was the testimony of a witness in answer to the question, 'There is one of those stop signs there at that intersection?' 'Yes, put up by the Automobile Club.' Apparently no question was raised in the trial court as to whether or not the stop sign was properly at the intersection, and neither respondent nor appellant attempted to prove or disprove that an authorization had been given to the automobile club by the board of supervisors to erect stop signs along Foothill boulevard. In the absence of any question as to the validity of the stop sign at the trial by the appellant, or any controversy as to whether it was properly at the intersection, we do not think it was incumbent upon the respondent to offer in evidence the official authorization for the erection of the sign, and her failure to do so under such

circumstances would not justify us in reversing a verdict in her favor."

[2, 3] In Abbott v. Cavalli, 114 Cal.App. 379, 382, 383, 300 P. 67, plaintiff tried the case on the theory that section 141¾ of the California Vehicle Act, adopted in 1929, Stats. 1929, p. 1580, was retroactive and that she, as a guest in an automobile, was required to prove gross negligence on the part of her host in order to recover damages, although the accident occurred prior to the date the amendment became effective. Later the Supreme Court decided, in Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438, that said section was not retroactive. Plaintiff then appealed, contending on appeal that, since the action was tried and determined on an erroneous theory, the judgment should be reversed. The appellate court affirmed the judgment, stating [114 Cal.App. 379, 382, 383, 300 P. 69]: "There would be much force in plaintiff's contention were it not for the fact that she invited the error of which she now complains". After defendants offered the instruction in question and requested the court to give it, if for any reason defendants did not want the court to read it to the jury, they should have withdrawn it, or otherwise made it known to the court that they did not desire to have it given. A party has no right to complain of instructions given at his own request, or of instructions given which were not offered by him, but which relate to a subject matter or legal question about which he himself has offered an instruction. Hughes v. Pacific Elec. R. Co., 58 Cal.App. 375, 380, 381, 208 P. 335; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 250, 73 P.2d 1163. The fact that the instant case was tried on the theory that the intersection was a through highway intersection, coupled with the fact that defendants submitted to the court an instruction explaining the right of way at such intersections, undoubtedly led the court to believe that defendants desired the court to give that instruction and, even if it were erroneous, defendants invited the error and cannot now be heard to complain. Abbott v. Cavalli, supra, 114 Cal.App. at pages 384, 385, 300 P. at page 67; Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal.2d 232, 250, 73 P.2d 1163; Jesse v. Giguiere, 24 Cal. App.2d 160, 163, 164, 74 P.2d 310.

[4] Appellants take exception to an instruction offered by plaintiff and given by the court which defined a through highway in the language of section 82.5 of the Vehicle Code, St.1937, p. 413, as follows: "The court instructs the jury that a through highway is a highway at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same when stop signs are erected as provided by law." Appellants maintain that said section 82.5 is general and that section 471 of the Vehicle Code is specific as to the requirements necessary to create a through highway; that they deal with the same subject matter and, therefore, are in pari materia and must be construed together as one; and that the definition of a through highway which was given by the court ignored the specific requirements of said section 471 which qualifies the general provisions of section 82.5. This, say appellants, might have confused the jury and it also permitted them to find that Oak street was a through highway when the evidence failed to show that it was legally so designated or that the erection of the stop signs was legally authorized, and thus the jury was allowed to change the rule of right of way applicable to the intersection in question. The most direct answer to this contention is that, as stated above, the case was tried on the theory that Oak street was a through highway and it was not necessary for the jury to determine whether or not such was the fact.

[5-7] This brings us to the last of the appellants' main contentions—that contributory negligence on the part of plaintiff appears as a matter of law. In view of our conclusion that the case was tried by all parties on the theory that the intersection involved was a through highway intersection, it is unnecessary to comment upon appellants' point that their automobile entered the intersection first and, therefore, under section 550 of the Vehicle Code, had the right of way. We feel that, under the theory developed at the trial, section 550 of the Vehicle Code does not apply and that section 552 of the Vehicle Code, relating to right of way at a through highway, does apply. Every intendment is in favor of the judgment and we must view the evidence most favorably to the plaintiff and respondent. The intersection was unobstructed; defendant driver could see 1,000 feet in the direction from which plaintiff was approaching; the plaintiff was traveling only three miles in excess of the prima facie limit. The jury undoubtedly believed that plaintiff was free from negligence as he approached the intersection and, therefore, had the right to presume that defendant Perry would stop

at the stop sign, would yield the right of way to him, and would not proceed into the intersection until he could do so without creating a traffic hazard. Sec. 552, Vehicle Code; Billig v. Southern Pac. Co., 192 Cal. 357, 363, 219 P. 992; Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560. The jurors, no doubt, were also convinced that defendant Perry failed to stop at the boulevard stop sign. The evidence also showed that when plaintiff realized that Perry had not stopped, but had rushed across in front of him, he attempted to stop his automobile, but was too close to defendants' truck to avoid the collision, due to the fault of Perry. There was evidence that plaintiff had a "shimmy" in his front wheels and appellants insist that, by reason of his failure to keep his automobile in proper mechanical condition, plaintiff was guilty of contributory negligence. However, the record is barren as to what effect, if any this had upon plaintiff's automobile, and there is no evidence indicating that such defect proximately contributed, in the slightest degree, to the injuries. Under such circumstances, it cannot be said that plaintiff was guilty of contributory negligence as a matter of law, and we believe that issue was an issue of fact for the jury to determine.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 306

**PEOPLE v. FLENAUGH.**

Cr. 447.

District Court of Appeal, Fourth District, California.

Feb. 14, 1940.

**Criminal law ⇐1182**

Where no proceedings on appeal from judgment were had after filing of clerk's transcript, no one appeared for appellant, and no briefs were filed for him, judgment must be affirmed on motion made by attorney general when cause was called for argument. Pen.Code, § 1253.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Proceeding by the People against George Flenaugh. From the judgment rendered, defendant appeals.

Affirmed.

W. E. Abraham, of Brawley, for appellant.

Earl Warren, Atty.Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

When this cause was called for argument, the attorney general moved to affirm the judgment under the provisions of section 1253 of the Penal Code. The clerk's transcript on appeal was filed on October 4, 1939, and no further proceedings were had in the matter. The cause was placed on the February 13, 1940, calendar for argument. No one appeared for appellant and no briefs have been filed for him. People v. Brown, 25 Cal.App.2d 360, 77 P.2d 300.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 176

**JOHN et ux. v. B. B. McGINNIS CO., Inc.**

Civ. 6280.

District Court of Appeal, Third District, California.

Feb. 5, 1940.

**1. Negligence ⇐32(2)**

A customer conducted into a room in a store by the store manager for purpose of selling customer a pair of slippers was an "invitee," as respects liability of store for injuries received when customer fell into an opening in floor when a trapdoor gave way.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

**2. Negligence ⇐134(8, 11)**

In customer's action against a store for injuries received when customer, while exam-

ing merchandise, stepped backward upon a trapdoor which gave way, evidence that store manager, who was showing the merchandise, knew of trapdoor and did not warn customer of it, and that trapdoor was not attached to floor, supported finding that store was negligent and that such negligence was proximate cause of injuries.

3. Negligence ⇐121(3)

The "res ipsa loquitur" doctrine was applicable in customer's action against a store for injuries received when customer, while examining merchandise, stepped backward upon a trapdoor which gave way, where customer did not know of trapdoor, and store manager, who was showing the merchandise, knew of trapdoor and did not warn customer of it, and accident would not have occurred if trapdoor, which was under exclusive control of store, had been properly fastened to floor.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

4. Negligence ⇐121(2)

When a thing which causes injury is shown to be under defendant's management, and accident is such as in ordinary course of things does not happen, if those who have management use proper care, it affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of care.

5. Negligence ⇐121(2)

The mere fact that plaintiff was injured upon defendant's premises is insufficient, standing alone, to justify application of res ipsa loquitur doctrine.

6. Negligence ⇐121(2)

The res ipsa loquitur doctrine, when applicable, creates a presumption of negligence against defendant establishing defendant's liability for damages in absence of evidence rebutting the presumption, and burden is upon defendant to overcome such presumption, though mere unknown reasons for an accident do not render the doctrine applicable.

7. Negligence ⇐15, 61(2)

Where defendant's liability for plaintiff's injuries sustained when a trapdoor in defendant's store gave way under plaintiff's weight was adequately established by ample proof to support finding that injuries were result of defendant's negligence, whether a plumbing contractor, who was claimed to have used the trapdoor approximately one week before accident, was guilty of concurrent negligence was immaterial, as respects defendant's liability.

---

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by Leonidas John and wife against B. B. McGinnis Company, Inc., for personal injuries sustained by Mrs. John when she fell into an opening in the floor of defendant's store when a trapdoor gave way. From a judgment for plaintiffs, defendant appeals.

Affirmed.

C. Ray Robinson, Willard B. Treadwell, and W. Eugene Craven, all of Merced, for appellant.

L. M. Linneman, of Dos Palos, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of plaintiffs allowing damages for personal injuries sustained by Mrs. John who fell into an opening in the floor of defendant's store when a trapdoor gave way.

The facts surrounding the accident are clear and uncontradicted. The plaintiff, Lenna John, entered defendant's store in Merced on the morning of February 9, 1938, to purchase a pair of house slippers. The manager led her back into the rear room where the shoes were kept for sale. She stood at the end of a table upon which he was displaying the slippers. Behind her there was an opening in the floor, between two joists, which was covered by a trapdoor fitting into the flooring flush with the surface. The door was not attached to the floor by means of hinges or otherwise. She had not been informed of this door and knew nothing of it. In examining the slippers, she stepped backward upon this trapdoor, which gave way beneath her weight, tilted up and caused her to fall through the opening. She was thereby injured quite seriously.

The only evidence of the previous use of that trapdoor was furnished by a plumber who testified that he raised the door and passed through the hole in the floor one week before the date of the accident, to reach the water pipes in the basement which he was repairing. He said he re-

moved the door which rested upon the joist on either side, and properly replaced it when he came from the basement. The manager of the store knew of the trapdoor but failed to warn Mrs. John of that danger.

Plaintiffs did not furnish proof of the cause of the tilting of the trapdoor. Mrs. John's attention had not been called to it, and she did not know what caused the door to slip from its proper position. The defendant offered no explanation of the cause of the accident.

The appellant contends there is a failure to prove negligence on the part of the defendant; that the doctrine of res ipsa loquitur is not applicable, and that the negligence, if any, of the subcontractor who was doing the plumbing will not subject the defendant to liability.

[1] In determing the liability of the defendant for the injuries received by Mrs. John, it may be stated the evidence is uncontradicted that the appellant had full and exclusive possession and control of the store and room where the accident occurred, and that the woman was an invitee, being a customer who was personally conducted into that very room by the manager for the purpose of selling her a pair of slippers.

The court, sitting without a jury, found that the defendant, mercantile corporation, had the exclusive care, control and management of the business and store building in which Mrs. John was injured; that the defendant negligently and carelessly maintained a trapdoor in the floor of its storeroom in such an unsafe and dangerous condition that when the plaintiff, Lenna John, entered the store, as an invitee, to purchase a pair of slippers, and stepped on that trapdoor it gave way under her weight and caused her to fall through the opening, resulting in her receiving serious injuries.

[2] The finding of negligence on the part of the defendant is adequately supported by the evidence. The record discloses specific acts and omissions of negligence. The trapdoor was near the table where the goods were displayed. It consisted of boards sawed from the floor and fastened together by cleats nailed upon the under side. The door rested on either side on narrow portions of the sills not more than an inch in width. The door was neither nailed to the joists, nor was it attached to the floor by means of hinges or otherwise. The floor was not inspected by the defendant for at least a week prior to the accident. The defendant knew that customers were likely to walk over that trapdoor. Ordinary prudence would require the door to be securely fastened or at least to be inspected to see that it was kept in proper position. The court was warranted in finding that it was maintained in a dangerous condition, and that such negligence was the proximate cause of the injuries received.

[3-4] In addition to the direct showing of negligent acts and omissions, as above related, the respondent relies on the doctrine of res ipsa loquitur in support of the judgment. We are of the opinion that doctrine applies under the circumstances of this case. A good statement of the rule in that respect is found in 19 California Jurisprudence, at page 704, as follows: "When a thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

The foregoing principle is supported by uniform authorities. Chutuk v. Southern California Gas Co., 218 Cal. 395, 398, 23 P.2d 285.

In the case of Gallagher v. Halpern, 95 Misc. 185, 159 N.Y.S. 160, the foregoing rule was approved in affirming a judgment for plaintiff for injuries received as a result of falling through an opening in the floor of a store where she was examining merchandise in a dimly-lighted room.

[5] It is true that the mere fact that the plaintiff was injured upon the premises of the defendant would be insufficient, standing alone, to justify the application of the doctrine of res ipsa loquitur. But the circumstances under which the injuries were received give rise to the application of the rule. Mrs. John did not know of that trapdoor or how it was presumed to be fastened or placed in the floor. If it had been properly placed in position or fastened, in the ordinary course of events the accident would not have happened. The defendant knew of that trapdoor and it had the exclusive management and control of it. If ordinary care had been exercised the door would not have been dislodged and the accident would not have occurred.

[6] The facts of this case differ radically from a situation under which a customer while walking over an apparently smooth floor or while descending steps which are free from obvious defects, suddenly trips and falls. A customer may inadvertently trip, slip or fall on an unobstructed floor of a store without any negligence or lack of care on the part of the management of the institution. In one such case cited by the plaintiffs it is pointed out by the court that the wearing of high-heeled shoes may have caused the accident. Mere unknown reasons for an accident do not render applicable the doctrine of res ipsa loquitur. In the present case the circumstances clearly show that the accident would not have happened except for specific acts or omissions of negligence attributable to the defendant because it had the exclusive control of the instrumentality by means of which the accident occurred.

The cases cited by the appellant upon that doctrine are readily distinguishable from the facts of this suit.

The conditions which have been shown to exist give rise to the doctrine of res ipsa loquitur which creates an inference of negligence against the defendant, establishing its liability for damages in the absence of evidence rebutting that presumption. The burden is then cast upon the defendant to explain the cause of the accident and to overcome the presumption of negligence. This it has utterly failed to do.

The only effort by the defendant to explain the cause of the accident was to prove that the plumber used that trapdoor about a week before the accident occurred, and it is inferred that he failed to properly replace the door. But Mr. Bardini, the subcontractor, denied that he failed to replace the door in its proper place. His testimony clearly refutes the defendant's inference. In response to the question, "Did you put it [the door] back in the position the same as it had been before you took it out?" he answered, "Yes sir".

By direct testimony of omissions to properly fasten the door or inspect the floor in that vicinity and by the inference raised by the doctrine of res ipsa loquitur, the finding of the court that the injuries to Lenna John were sustained as a proximate result of the negligence of the defendant is amply supported by the evidence. Its liability is satisfactorily established.

[7] There is no substantial evidence of negligence of the plumber holding the contract to repair the water pipes, which contributed to the accident. He claims to have properly replaced the trapdoor. There is no evidence to the contrary. But since the liability of the defendant was adequately established by ample proof to support the finding that the injuries were the result of its negligence, it is immaterial whether the plumbing contractor may have also been guilty of concurrent negligence. Canvin v. General Brewing Corp., 20 Cal.App. 2d 49, 54, 66 P.2d 691.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




37 Cal.App.2d 282

**PEOPLE v. FLORES.**

**Cr. 3276.**

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1940.

**1. Criminal law ⇐575**

Failure of defendant to object to trial being set beyond 60 days after filing of information constituted a consent thereto, and hence defendant was not entitled to have prosecution dismissed on ground that he was not brought to trial within 60 days after filing of information.

**2. Criminal law ⇐573**

Where, because of congested court calendar, trial was set three days after expiration of 60-day period commencing from date of filing information, without defendant objecting thereto, defendant was not denied a "speedy trial" guaranteed by the constitution.

[Ed. Note.—For other definitions of "Speedy Trial," see Words & Phrases.]

**3. Criminal law ⇐573**

In determining whether a defendant was afforded a "speedy trial" guaranteed by the Constitution, time is not sole basis for such determination, but time, together with surrounding circumstances, should be considered.

**4. Witnesses ⇐323**

Counsel upon being taken by surprise by his own witness may, on announcing surprise, ask leave to cross-examine witness, but asserted surprise must be genuine and not based solely on fact that witness failed to testify as expected, and opposing counsel may dispute alleged surprise, thereupon raising a collateral issue to be determined by trial court.

**5. Criminal law ⇐419(4)**

Where witness for prosecution denied knowing defendant and district attorney without properly claiming surprise questioned witness as to statements made to police officers, which statements witness denied making, evidence given by officers purporting to impeach witness, consisting of statements made by him outside presence of defendant, was "hearsay" and inadmissible.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

**6. Criminal law ⇐1186(4)**

Under constitutional provision that a judgment shall not be reversed unless errors complained of result in a "miscarriage of justice," reviewing court must direct a reversal when it is unable to say whether appellant would or would not have been convicted but for errors of trial court, and mere fact that evidence may legally be able to stand up under weight of judgment is not sufficient reason for refusing to set aside the judgment. Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

**7. Criminal law ⇐1186(4)**

In grand theft prosecution wherein defendant took witness stand and denied his guilt and asserted that confession introduced into evidence had been obtained by force, hearsay evidence consisting of narrative of statements allegedly made by witness to police officers outside presence of defendant, and involving defendant not only in commission of offense with which he was charged but in many others, justified reversal of conviction, notwithstanding constitutional provision that a judgment shall be reversed only when errors complained of result in a "miscarriage of justice." Const. art. 6, § 4½.

**8. Criminal law ⇐700**

District attorneys, in prosecuting cases, should conduct them as faithfully and diligently as if constitutional provision, saving convictions where errors did not result in any miscarriage of justice, did not exist, and should not depend upon saving grace of such provision. Const. art. 6, § 4½.

---

Appeal from Superior Court, Los Angeles County; George A. Dockweiler and Frank G. Swain, Judges.

Jesus R. Flores was convicted of grand theft, and he appeals.

Reversed, and cause remanded.

John A. Holland, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney and containing three counts appellant was accused of the crime of grand theft, allegedly committed by him in the unlawful taking of three automobiles on three separate occasions. Conviction of appellant on all three counts of the information followed a trial by jury. From the judgment pronounced thereon and from an order denying his motion for a new trial, appellant prosecutes this appeal.

[1-3] For his first ground of appeal appellant charges error on the part of the trial court in denying his motion for a dismissal on the ground that he was not brought to trial within sixty days after the filing of the information. In this connection the record reflects the fact that the information was filed May 29, 1939. Trial of the cause was originally set for July 7, upon which date it was continued to July 10 "because of the congested calendar". On the last-named date, when the case was called for trial it was again continued to July 28, for the reason, as stated in the court's minutes, "because of the congested calendar". On July 28 the case was again continued by the court "because of the congested calendar", to July 31, on which last-named date the cause proceeded to trial. Following the continuance on July 28 and late in the afternoon of that day appellant served and filed a written motion for dismissal, which motion was noticed for July 31, upon which last-named date it was argued and by the court denied. It should be noted that no objection to the aforesaid continuances was made by appellant until after the court had

made its order on July 28 setting the case for trial beyond the sixty-day limit. The failure of appellant to object at the time on July 28 when his trial was set for a time beyond the sixty-day limit is equivalent to a consent thereto upon his part. In fact, consent is presumed when a defendant fails to object at the time the cause is set for trial beyond such period. Ray v. Superior Court, 208 Cal. 357, 358, 281 P. 391, and cases therein cited. Further, under the circumstances here present, viz., congested condition of the court's calendar, coupled with the fact that the defendant was brought to trial within three days after the expiration of the sixty-day period, we cannot say that appellant did not receive a speedy trial within the meaning of the Constitution when on the occasion of each of the continuances he made no objection thereto. As was said by this court in People v. Romero, 13 Cal. App.2d 667, 672, 57 P.2d 557, 559: "Time, only, will not always suffice as the sole basis for the determination of this question, but time, together with the surrounding circumstances, avoids an arbitrary standard and yet effectively preserves the safeguards created by the Constitution." See also People v. Brock, 87 Cal.App. 601, 262 P. 369, 263 P. 544.

Finally, appellant contends that the court erred in its rulings admitting certain evidence which it is claimed was hearsay. In this regard it appears that one Arthur Almerez was brought from San Quentin prison to testify in behalf of the People. The preliminary questions were as follows:

"Q. (By Mr. Blalock, Deputy District Attorney): Do you pronounce that Amerez? A. Yes, sir.

"Q. Mr. Amerez, you are now serving a term in the state prison at San Quentin, are you not? A. Yes, sir.

"Q. For automobile theft? A. Yes.

"Q. That was from Orange County, was it not? A. Yes.

"Q. When were you arrested in Orange County? A. May 7th.

"Q. May 7th? A. Yes.

"Q. Do you know this defendant, Jesus Flores? A. I don't know him good.

"Q. You know him, though, not whether you know him good or bad? A. Just saw him up North.

"Q. Whereabouts up North? A. In Ione.

"Q. In Ione? A. Yes.

"Q. When did you meet him? A. I didn't meet him. I seen him up there.

"Q. That is the state reformatory? A. Yes.

"Q. You saw him after that down here, didn't you? A. No, I haven't; well, right here in this room here.

"Q. But you never saw him at any time at any other place? A. No, sir."

Evidently the witness was expected to testify to facts involving the defendant in the offense with which defendant was charged, for the next question was as follows:

"Q. You know this officer, do you not? (Indicating Officer Stites.) A. I don't remember.

"Q. You don't remember seeing him, is that it? A. No, sir.

"Q. Do you know this officer, Mr. Patterson? A. I don't know.

"Q. Did you ever see him before? A. The only ones I seen are the ones in the Norwalk police station.

"Q. Did you ever see Mr. Patterson? A. Somebody like that, but I don't know."

Then followed an inquiry along the same lines with regard to several other officers, in connection with which the witness was asked if he did not make statements to these various officers which involved defendant and appellant in the offenses for which he, the defendant, was on trial. All of these inquiries by the district attorney relative to statements made to the officers were denied by the witness Almerez. Objections were duly made to all of the questions. The officers were thereafter sworn, and they testified to the statements which the witness Almerez had denied having made, respectively, such testimony being permitted on the theory that it was admissible for impeachment purposes. Objections were duly made to all of the foregoing testimony and a motion to strike was denied.

[4] The lack of understanding among judges and lawyers with regard to a situation such as is here presented is quite common. The only proper and legal procedure in the circumstances is as follows: Upon being taken by surprise by such a witness, counsel may, upon announcing surprise, ask leave to examine the witness by leading questions, or in other words, to cross-examine the witness; but the assert-

ed surprise must be genuine. Opposing counsel may dispute the alleged surprise, thereupon raising an incidental or collateral issue, which necessarily must be disposed of by the trial judge. Counsel disputing the alleged surprise may ask leave to cross-examine the witness in connection with such subject, and may offer other evidence relevant to the issue. Whether counsel who produced the witness will be permitted, under such circumstances, to cross-examine such a witness depends upon the determination of the issue thus presented.

The situation with which we are confronted, however, offers no such difficulties. "Surprise" was neither properly claimed by the district attorney, nor disputed by defense counsel. There was no showing that the district attorney had ever talked with the witness Almerez or that the latter at any time led the prosecutor to believe that he would testify as counsel for the People declared he expected the witness would. It requires no citation of authority for the statement that the party producing a witness cannot claim surprise and thereby ipso facto acquire a right to cross-examine such witness simply because the latter does not testify as expected. The examination of the witness proceeded apparently upon the theory that the district attorney could pursue the inquiry as a matter of right. Such is not the law. The witness Almerez' denial that he made the statements attributed to him left nothing more to be done in connection with the incident. Although it is not the function of an appellate tribunal to publish a primer on the subject, it appears worth while to continue further, that if Almerez had admitted making the above-mentioned statements to the officers the proper inquiry following such an admission manifestly would be, were such statements the truth? If admitted by the witness to be the truth, such admission would be followed by questions serving to elicit from the witness the evidence directly. If, on the other hand, the witness admitted making such statements to the officers but denied the truth thereof or declared such statements to be false, the inquiry is at an end. Manifestly, nothing is to be gained by producing the officers to testify to statements admittedly made.

[5] The evidence given by the officers purporting to impeach the witness Almerez, consisting as it did of statements made outside the presence of the defendant, was hearsay, and therefore inadmissible and highly prejudicial. The witness Almerez had given no testimony whatsoever, and there was therefore nothing in his testimony to refute, and the witness, having given no evidence, was not the proper subject of impeachment. All that the testimony of the officers accomplished or tended to accomplish, other than to prejudice the accused before the jury, was to prove whether Almerez was untruthful or whether the officers were untruthful, a fact wholly immaterial to the issue of guilt. Such methods are dangerous, to say the least, and cannot be accepted as valid on any basis, but to the contrary, should be emphatically condemned. However honest and well-intentioned the procedure may have been in the instant case, it requires no stimulus to the imagination to contemplate that if permitted it would facilitate abuses that would be vicious in the extreme. The rulings of the trial court permitting such procedure in the instant case were therefore erroneous.

[6, 7] In disposing of this appeal we must now inquire into the effect of the errors of the trial court in the light of the provisions of section 4½ of article VI of the Constitution. Appellant took the witness stand and denied his guilt. True, a confession of guilt allegedly made by him to some of the officers was admitted in evidence, but appellant steadfastly insisted that the same was obtained by the use of force and violence, thereby raising an issue before the jury as to whether such confession was freely and voluntarily given and therefore admissible. The hearsay evidence to which we have heretofore adverted was of course not any evidence against appellant, but who can say to what extent it inspired a belief in the minds of the jurors that appellant's confession was not only a free and voluntary one but truthful as well? With this hearsay and incompetent evidence before them, containing as it did a narrative of statements allegedly made by the witness Almerez to police officers outside the presence of the defendant, and involving the defendant not only in the commission of the offenses with which he was charged but in many others for the commission of which he was not on trial, who can determine what inferences were drawn therefrom by the jury against defendant? It is the law, as stated in People v. Degnen, 70 Cal.App. 567, 234 P. 129, 145, that when applying the provisions of section 4½ of article VI of

the Constitution to an entire cause, we must direct a reversal when we are unable to say "whether appellant would or would not have been convicted but for the errors of the court". Can we say that the jury would have decided that the confession was to be considered as evidence if the minds of its members had not been impregnated with the incompetent and highly prejudicial evidence aforesaid? We certainly cannot say that. In People v. Davis, 210 Cal. 540, 546, 293 P. 32, 39, the Supreme Court says: "Section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may legally be able to stand up under the weight of the judgment is sufficient reason in all cases for refusing to set aside the judgment." There seems to be a growing tendency to permit incompetent and immaterial matters to be received in evidence notwithstanding well-grounded objections, apparently because of the hope that perchance it may finally be determined on appeal, if a conviction ensues, that when measured by the provisions of section 4½ of article VI of the Constitution, such immaterial, incompetent and prejudicial matter neither contributed to nor controlled the verdict. The errors here present and the prejudicial evidence born thereof will not permit of the application of the saving grace of the constitutional section, and therefore we have no recourse but to hold that the judgment and the order denying the motion for a new trial must be reversed.

[8] In closing we deem it opportune and timely to repeat the salutary admonition contained in People v. Black, 73 Cal. App. 13, 43, 238 P. 374, 387, wherein the court said: "* * * We feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal.App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

For the reasons stated, the judgment and the order denying defendant's motion for a new trial are, and each of them is, reversed, and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.




37 Cal.App.2d 341

**PEOPLE v. LATHROP et al.**

Cr. 3267.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1940.

**1. Larceny ⇐65**

Evidence sustained conviction for grand theft of oil well equipment.

**2. Criminal law ⇐338(1)**

In prosecution for grand theft of oil well equipment, trial court did not err in refusing to allow defendant on cross-examination to inquire into the market value of the equipment as junk, where the evidence was that equipment was usable and not junk.

**3. Criminal law ⇐829(1)**

Trial court's refusal to give requested instructions was not error, where instructions given fully covered requested instructions, and fully and fairly informed the jury as to the law involved.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

George Donner Lathrop, Paul Summers, and Louis M. Mead were found guilty of grand theft, and Louis M. Mead appeals.

Judgment affirmed, and appeal from conviction and sentence dismissed.

Vernon R. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

The defendants were charged jointly with the crime of grand theft and upon a jury trial were found guilty as charged. Defendant Mead alone prosecutes this appeal from the "conviction, judgment and sentence imposed upon" him, upon the grounds that (1) the evidence is insufficient to support the verdict; (2) the trial court erred in restricting him upon cross-examination as to the question of value of the property alleged to have been taken; and (3) the court erred in refusing to give certain instructions requested by appellant.

A review of the evidence adduced at the trial reveals that around the hour of 11:20 o'clock on the evening of March 23, 1939, deputy sheriff Reid responding to a call arrived at the corner of Pico-Coffman road and Whittier boulevard in the county of Los Angeles, where he found an abandoned Studebaker sedan loaded with oil well equipment described as tool joints and couplings. Apparently the automobile had broken down under the weight of the load, because the tires on the rear wheels were off and the rims flattened out. The officer parked his car a short distance away and about an hour later he observed a Ford truck drive up and stop beside the Studebaker; upon approaching the same he found that defendant Lathrop was driving the truck and defendant Summers and appellant Mead were standing near the Studebaker. When questioned by the said officer, appellant gave his name, stated that he owned the Studebaker, but denied that he knew anything about the theft of the oil well equipment, although he admitted that he had been with the two defendants and had helped them load the equipment into his car. In the presence of appellant, defendant Lathrop told officer Reid that they had stolen the equipment, and defendant Summers admitted that he had helped to steal it. In company with Lathrop and two other deputy sheriffs, officer Reid traced the rim marks of the Studebaker into a gas station at the corner of Durfee road and Whittier boulevard, from the gas station to Passons boulevard, and south thereon about a mile when the tracks disappeared. From that point officer Reid drove under the direction of defendant Lathrop to the corner of Butler road and Santa Fe Springs road and into a field near the Union Oil Company yards, where he observed "the grass all tramped down and the ground cut up with something, I don't know what, a fresh disturbance of the earth. There was a five or six-foot wire fence there, a cattle fence construction, which was bent slightly out, where various types of couplings were stacked on the inside of the fence, * * * We returned to the station, ordered the truck and Studebaker car and its contents impounded in the Golden State Garage in Norwalk. * * * We went back in the station again and talked to both Summers and Mead again, and still Mead denied that he knew the material had been stolen. Summers admitted the fact that he knew it was being stolen. * * * He said he was with the boys when they stole the material and that he knew it was being stolen.

"Q. Was Mead present at that time? A. He was. He still denied it.

"Q. What did he say? A. He says, 'The car was mine, and I was with them, but I didn't know it was being stolen. * * *

"The Court: Mr. Reid, I am not quite clear as to an expression you used. Did you mean Mr. Mead said he was there when the oil fittings were taken, but did not know they were being stolen? A. Yes, your Honor, that is the statement. * * * He didn't deny—he didn't deny that he had stolen it; he denied that he knew it was being stolen, but he was there with the boys and he owned the car."

Officer Shafer testified that he questioned defendant Lathrop (without the presence of the other two men) and he said "they went down to Santa Fe Springs, went in the yard at Santa Fe Springs and throwed all these tool joints over the fence. * * * I asked him how he came to do this thing, and he said 'I don't know. I was just driving around looking for a place to get some material.' I asked him if he didn't know that was too much to put in an automobile like that, to put a ton in there, and he said 'There is nearer two tons than there is a ton.' And I asked him why they put so much on. 'Well,' he said, 'they threw it over the fence and the rest of the boys

wanted to get it all.' I asked him whose car it was, and he said it was a car that Mead had just bought, or had just contracted for on the same day that they went out after these tool joints.

"Q. Was anything said at that time about the truck? A. Oh, yes. I asked him where he got the truck and he said after they broke down that the three of them took a bus, went to Los Angeles, went down on South Flower Street where they had the truck parked, got the truck and drove back, going out to their car for the purpose of unloading the material out of the car and into the truck."

Mr. Todd, general foreman of the Santa Fe Springs warehouse and yards of the Union Oil Company, testified that there is a five-foot wire fence around said yard, in which is kept a great deal of oil well drilling equipment, including several hundred tool joints or couplings, and where they are reconditioned and kept until needed; that upon the morning of March 24, 1939, he observed a number of couplings had been taken from a point in the yard next to the fence. On the opposite side of the fence he "noticed that there had been tire marks of cars that had been there, and the ground was all chewed up. It was * * * just after a rain, and the ground was soft, and the grass was all trampled down, and the ground had been all chewed up * * *." He then went to the garage across the street from the sheriff's office at Norwalk, where he saw a Studebaker sedan; that in and near the car he saw a number of couplings which he identified as the property of the Union Oil Company, which had come from his yard; that they had not been removed from the yard by company men; that he then had the couplings removed from the garage and placed in a rack in the company's yard; that there were 98 couplings of various sizes of a value of at least $750. He testified he had never given permission to the defendants or to anyone else to take those couplings from the company's yard. The 98 couplings weighed about 3,860 pounds, and were all usable. Mr. Hausmann, an employee of the Union Oil Company, also identified the couplings as the property of the company.

Appellant took the stand in his own defense and claimed that he did not know the equipment was stolen and that he got it from a place near Huntington Beach. His story as told to the jury was substantially as follows: That he and his two codefendants drove to Huntington Beach on the afternoon of March 23d; that he was not familiar with the streets there; that they finally arrived where these couplings were piled in a field and that there were oil derricks to be seen in the distance; that defendant Lathrop pointed out the couplings and the three men loaded them into appellant's car; that they then started back to Los Angeles, had tire trouble and had to leave the car; that they then came into Los Angeles, got the truck and returned to the car. He denied that he knew the property belonged to the Union Oil Company; denied that he took it from the said company or that he advised or assisted anyone to take it. However, he admitted that he was present and assisted in loading the couplings into his car. This testimony at most created a conflict in the evidence as to whether the car was loaded in a field near Santa Fe Springs or in a field near Huntington Beach.

Appellant contends that there is no direct evidence which connects him in any way with the original taking or carrying away of any of the property from the possession of the Union Oil Company; that if he had any guilty connection with the stolen property it would appear from the evidence that it must have been subsequent to the original theft of the property.

[1] As has heretofore been pointed out, appellant consistently denied that he knew the couplings were stolen or that he advised or assisted anyone to take them. At the same time, he admitted that he was present and helped to load the oil well equipment into his car so that it could be transported to Los Angeles. Under the circumstances, it became a question for the jury to determine which story it should believe, and there is direct and circumstantial evidence of sufficient substantiality to support the verdict of the jury and the judgment of the court.

[2] The court refused to allow appellant upon cross-examination to inquire into the market value of the couplings as junk. This ruling did not constitute error, for the reason that the evidence was to the effect that the couplings were usable and not junk; therefore, the value of the property as bulk steel or junk became immaterial. In this connection, it should be noted that later in the trial, defendant Lathrop testified that he bought as junk and paid $3 for a carload of couplings.

[3] Appellant claims that it was error for the trial court to refuse to give two instructions which appellant requested be given to the jury. A review of all of the instructions given reveals that the jury was fully and fairly informed as to the law involved in the instant cause, and that the subject-matter of the requested instructions, which the trial court refused to give, was fully covered by the instructions which were given.

The judgment appealed from is affirmed; the purported appeal from the conviction and sentence is dismissed.

We concur: DORAN, J.; WHITE, J.




37 Cal.App.2d 148

**PEOPLE v. MIZER.**

Cr. 1709.

District Court of Appeal, Third District, California.

Feb. 2, 1940.

**1. Perjury ⇐33(8)**

Evidence that defendant testified falsely at trial of delinquency proceeding against his half-sister and another, regarding his knowledge of improper relationship between half-sister and other person in presence of half-sister's 11-year-old daughter, supported conviction of perjury.

**2. Perjury ⇐29(4)**

In perjury prosecution, wherein information alleged "That all of said answers to said questions made by the defendant were false and known to be false by the defendant," proof that defendant answered truthfully two of preliminary questions which were unnecessary to charge of perjury did not constitute a "fatal variance."

[Ed. Note.—For other definitions of "Fatal Variance," see Words & Phrases.]

**3. Perjury ⇐26(4)**

An information, which alleges that each and every one of answers made by defendant were false, must be deemed sufficient as a separate assignment of perjury based upon each answer sworn to by the defendant.

**4. Indictment and Information ⇐196(1)**

Any uncertainty regarding meaning of language of information is waived by failing to demur.

**5. Perjury ⇐37(1)**

In perjury prosecution, wherein information alleged, "That all of said answers to said questions made by the defendant were false and known to be false by the defendant," an instruction that it was not necessary to prove that each and all of the answers of the defendant were false, but that, if jury believed beyond reasonable doubt that defendant had willfully sworn falsely to any one of the material statements charged, it was their duty to find him guilty, was proper.

**6. Indictment and Information ⇐171**

A "variance" between allegations of information is a disagreement between averments of information and proof in some matter which is legally essential to the charge, and a variance as to matter which is not material is not a "fatal variance."

[Ed. Note.—For other definitions of "Variance," see Words & Phrases.]

**7. Perjury ⇐29(4)**

Strictness of proof is required in all matters which constitute essence of crime of perjury, and a substantial variance in such regard is fatal, but strict proof is not required as to immaterial averments, or as to those which are not descriptive of the offense, and a variance in respect of such matters is not fatal.

**8. Criminal law ⇐808½**
**Perjury 37(1)**

In perjury prosecution, an instruction defining perjury in the language of the statute, and which stated that defendant could not be convicted unless it appears beyond a reasonable doubt and to a moral certainty that under oath in a trial before a competent court he willfully testified falsely as to the material facts which were not only false but which he knew to be untrue, was properly given.

---

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Benny Mizer, true name Benford Mizer, was convicted of perjury, and he appeals.

Affirmed.

Margaret Gettys Hall, of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from an order denying his motion for a new trial after a verdict was rendered finding him guilty of perjury. The motion was presented on the grounds that (1) the court misdirected the jury in a matter of law, (2) the court erred in the decision of questions of law in the course of the trial, and (3) the verdict is contrary to law and the evidence. The judgment was suspended and the defendant was granted probation for the term of three years subject to his service for six months in the Stanislaus county road camp.

The defendant was charged with perjury consisting of falsely testifying under oath at a trial in the juvenile court of Stanislaus county on charges against Buford Anderson and Mary Parchan of contributing to the delinquency of the latter's minor daughter. The information alleges that the perjury consisted of wilfully swearing falsely to material issues embraced in fourteen questions and answers quoted from his testimony in the delinquency proceeding. The falsity of his evidence was established by the testimony of Anderson who frankly admitted the delinquency charges against him. To impeach the defendant the district attorney and the chief of police testified that the defendant previously told them of his knowledge of the facts establishing Anderson's guilt of the delinquency charges, which statement was in absolute conflict with every material answer in response to the questions recited in the information. Two of the questions contained in the perjury charges were truthfully answered by the defendant in his testimony at the delinquency proceeding. But those two questions were merely preliminary and not material to the chief issue regarding the necessary elements of perjury consisting of alleged false testimony regarding defendant's knowledge of improper relationship between his half-sister and Anderson in the presence of her minor daughter. The perjury charge was fully established independently of those two challenged questions and answers.

The facts which led to the trial of the delinquency proceeding, from which this perjury charge developed, were as follows: Mary Parchan and her eleven-year-old daughter were sleeping together in a bed at one end of a trailer house parked at the rear of a saloon. In the other end of the same trailer house Buford Anderson and the defendant, a nineteen-year-old half-brother of the woman, slept on a pallet. Anderson and Mary Parchan were not married. She was a dissolute woman. Anderson testified that while he was sleeping with the defendant in that trailer he arose on several occasions and got into bed with Mrs. Parchan and had illicit relations with her, in the presence of her daughter, who also occupied the bed at the same time. Information of their flagrant conduct reached the officers. The defendant was interviewed and told them that he saw, heard and knew that Anderson committed those acts on at least three occasions, relating the circumstances and details thereof. The delinquency proceeding was then commenced. At that trial, under oath, the defendant flatly denied that he either saw, heard or knew that Anderson ever committed those acts. He said he had no knowledge of that illicit relationship, and he denied that he had told the officers he had any such knowledge. A portion of the defendant's false testimony was incorporated in the information in this case, as the basis of the charge of perjury.

[1] The verdict is adequately supported by the evidence. The record leaves no doubt that the defendant knew of Anderson's illicit relations with his half-sister in the presence of her daughter; that he was present several times when those acts were performed, and that he previously told the truth to the officers regarding Anderson's conduct. From the fact that those acts were repeatedly performed in a small trailer room in the immediate presence of the defendant, warranted the jury in believing and finding that the defendant saw, heard and knew of Anderson's conduct.

The substance of the charge of perjury in this case is the defendant's false testimony at the trial of the delinquency proceeding regarding his knowledge of the improper relationship between his half-sister and Anderson. His knowledge of that relationship was the important factor determining his guilt or innocence of the charge of perjury. The implied findings of the jury necessarily assume that they believed the defendant knew of the illicit relations in the presence of the minor child, and that he wilfully testified falsely in that

regard. There is an abundance of evidence to support the verdict of his guilt of perjury as charged. There was no miscarriage of justice in this case.

[2, 3] The appellant contends there is a fatal variance between the allegations of the information and the evidence adduced in that the information asserts that *"all of said answers* to said questions * * * were false", while the evidence is uncontradicted that two of the answers were really true. On the theory that it was necessary for the prosecution to prove that each and every one of the answers to the questions included in the information were false in order to constitute the charge of perjury, it is claimed the verdict is not supported by the evidence. The two challenged questions to which true answers were given are:

(1) "Q. Did they (District Attorney and Chief of Police) *ask you* if Anderson had been sleeping with your sister? A. I think they did."

(2) "Q. Didn't he (the District Attorney) or the Chief of Police Arington *ask you about Anderson getting into bed with your sister?* A. They asked me if he did."

The answers to all of the other questions were false. The two preceding questions and answers were merely preliminary to the real merit of the inquiry. They did not involve necessary elements of the perjury charge which was based on defendant's actual knowledge and testimony regarding Anderson's illicit relations with his half-sister in the presence of her daughter. The fact that those two questions were truthfully answered is immaterial in determining the defendant's guilt or innocence of the charge of perjury.

In support of the appellant's claim that every answer to the fourteen questions quoted in the information must have been found to be false, before the verdict can be sustained, he relies on the cases of Welch v. State, 88 Tex.Cr.R. 346, 227 S.W. 301, and People v. Senegram, 27 Cal.App. 301, 149 P. 786, 787. In the first case cited it is said: "Having alleged it [the language constituting the alleged perjury] in solido and that all the testimony alleged be false was in fact false, the state must so prove it in order to secure a conviction."

The doctrine of "in solido" which is announced in the Texas case is not supported by the Senegram opinion. At least that rule has no application to the facts of either the present case or the Senegram suit. In the Senegram case the indictment charged perjury consisting of false statements in each one of the answers to thirty questions recited therein. The court says in regard to the necessity of proving that each answer was false: "The indictment, since it alleges that each and every one of the answers was false, *must be deemed sufficient as a separate and distinct assignment of perjury based upon each answer sworn to by the defendant.* If this be true, it necessarily follows that the court committed no error by instructing the jury that if they found *any of the matters* or testimony set forth in the indictment *to be false,* such fact was sufficient to justify them in bringing in a verdict of guilty."

That statement of the law answers the contention of the appellant in this case adversely to him.

[4, 5] In the present case the information alleges "That all of said answers to said questions made by the defendant were false and known to be false by the defendant." Reasonably construed that statement means that *each and all* of the answers were false. If they were *all* false, then *each of them* was false. The only answers which were not false were in response to preliminary questions which were unnecessary and immaterial to the charge of perjury. If there was any uncertainty regarding the meaning of the language of the information, it was waived by failing to demur to the pleading. In this action, similar to the Senegram case, the court properly instructed the jury that it was not necessary to prove that *each and all* of the answers of the defendant were false, but that if they believed beyond a reasonable doubt that he had wilfully sworn falsely to *any one of the material statements charged,* it was their duty to find him guilty. There can be no doubt all of the jurors agreed upon his guilt with respect to the same charges, because they found him guilty of each and all of them by returning a verdict of "Guilty of perjury, * * * *as charged in the information.*"

In the case of People v. Pahrman, 117 Cal.App. 433, 4 P.2d 242, 244, in which a hearing by the Supreme Court was denied, the doctrine of in solido was not approved. The application of that principle was rejected. If accepted it would necessarily have resulted in a reversal. The indictment in that case charged perjury by alleging conjointly two distinct statements of the

accused and asserted that each of them was false. Only one of them proved to be false. The other one was true.

The defendant was nevertheless convicted of perjury "as charged". The judgment was affirmed. The court said regarding the doctrine of "in solido", after reviewing the Welch case, the Senegram case and other perjury authorities, that: "This somewhat lengthy review of the authorities satisfies us that the rule contended for not only is not established in this state, but also that it is not so rooted in the common law that it is a 'fixed and fundamental principle of law' to which we must bow."

There is no doubt that when several inseparable statements which are necessary and material parts of the same narrative are charged as perjury, the failure to prove a material portion thereof is fatal to a conviction. That situation clearly has no application to the facts of this case.

[6] To invalidate a verdict on account of variance between the allegations of the information and evidence of the crime, it must appear that some *necessary and material* element of the charge lacks proof. The absence of evidence on an immaterial portion of a recitation of facts will not vitiate the verdict. In 31 Corpus Juris, page 840, section 451, it is said in that regard: "Variance is defined to be a disagreement between the averments of the indictment and the proof in some matter *which is legally essential to the charge.* * * * A variance as to a matter which is not material is not fatal."

[7] With respect to the crime of perjury it is likewise said in 48 Corpus Juris, page 886, section 138: "Strictness of proof is required in all matters which constitute the essence of the crime, and a substantial variance in this regard is fatal; but strict proof is not required as to immaterial averments, or it has been stated, as to those which are not descriptive of the offense, and a variance in respect of such matters is not fatal."

The court did not err in giving, refusing to give or modifying instructions to the jury. The chief error in the court's charge to the jury assigned by the appellant involves the same question previously determined with respect to the necessity of finding that each answer to the various questions quoted in the information was false. In accord with what we have said upon that subject, defendant's instruction number 4 was properly refused. It directed the jury that each and every answer to the questions included in the information must be found to have been false before the defendant could be convicted of perjury. On the contrary, the prosecution's instruction number 7, which was properly given to the jury asserted that it was not necessary for them to find that each and all of the answers were false, but that it was sufficient if they found any one of the material statements charged as perjury to have been false. That instruction was taken almost verbatim from the case of People v. Senegram, supra, in which that statement of the law was specifically approved. The appellant in this case may not complain that he was found to be guilty of perjury as charged in the information merely because he truthfully answered two preliminary questions, but falsely answered the other twelve questions bearing directly on his knowledge of the illicit relations between his half-sister and Anderson, which is the very gist of the crime of perjury with which he was charged.

[8] The jury was properly instructed with respect to the intent with which the false testimony was given. Perjury was defined in the language of the statute. The jury was plainly told they could not convict the defendant unless it appeared beyond a reasonable doubt and to a moral certainty that, under oath, in a trial before a competent court, he wilfully testified falsely as to material facts, which were not only false, but which he knew to be untrue. It follows that such false testimony is necessarily given with the deliberate intent to deceive the jurors or the court with respect to the essential facts involved.

Defendant's instruction number 5 was argumentative and misleading. It was therefore properly refused.

The jury was fully and fairly instructed with respect to the crime of perjury as it is charged in the information. There is no substantial error in the charge of the court to the jury.

The motion for a new trial was properly refused.

The order is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

37 Cal.App.2d 241

**STROH v. BAUMAN.**

**Civ. 2427.**

District Court of Appeal, Fourth District, California.

Feb. 9, 1940.

**1. Appeal and error ⇐110**

An order denying a motion for new trial is not an appealable order. Code Civ.Proc. § 963.

**2. Appeal and error ⇐1005(3)**

Where jury and trial judge accepted defendant's testimony as true and resolved conflicting evidence against plaintiff, District Court of Appeal would not substitute its opinion on weight of evidence in favor of either party.

**3. Appeal and error ⇐1066**

An erroneous instruction on imminent peril rule which omitted the element that a defendant must himself be free from negligence before he can avail himself of such rule was not prejudicial to pedestrian where it appeared that pedestrian suddenly appeared in front of automobile so close that motorist had neither time nor opportunity to do anything to avoid accident.

**4. Appeal and error ⇐1064(1)**
**Automobiles ⇐246(60)**

An instruction that there was a presumption that motorist was innocent of wrong and was traveling at lawful rate of speed on proper side of street and that such presumption was a species of evidence was improper but not reversible error, especially where a similar error was committed in favor of plaintiff at her request. Vehicle Code, St.1935, p. 93; Code Civ.Proc. § 1963, subd. 4.

---

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action by Mary Stroh, an incompetent person, by Minnie Farley, her guardian ad litem, against N. W. Bauman for injuries suffered by plaintiff as a result of having been struck by defendant's automobile. From a judgment entered on a verdict for defendant, plaintiff appeals.

Affirmed.

Russell S. Waite and Kelley & Hews, all of Riverside, for appellant.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for respondent.

MARKS, Justice.

[1] This is an appeal from a judgment entered on the verdict of a jury in favor of defendant in an action for damages for injuries suffered by plaintiff as a result of having been struck by defendant's automobile and thrown to the pavement. The collision occurred at or near the intersection of Lime and Seventh streets in the city of Riverside. Plaintiff has also attempted to appeal from the order denying her motion for new trial. Such an order is not appealable. Sec. 963, Code Civ.Proc.

Lime and Seventh streets intersect at right angles with the latter running east and west. A pedestrian lane was marked across Seventh street in prolongation of the easterly curb and property lines of Lime street.

Plaintiff, and three disinterested witnesses, testified that at about 7 o'clock on the evening of November 7, 1937, she was crossing Seventh street from south to north in the pedestrian lane just mentioned. Two of these disinterested witnesses testified that they saw the automobile driven by defendant traveling east on Seventh street; that it ran into plaintiff while she was in this pedestrian lane; that the impact hurled her twenty-five or more feet to the east where she landed on the pavement. Plaintiff and two of these witnesses testified that she looked to the east and to the west for approaching traffic before stepping into the roadway of Seventh street.

The foregoing evidence is contradicted by the testimony of defendant. His story was that after he had crossed the intersection and the pedestrian lane a number of feet and was proceeding at not more than twelve miles an hour with the headlights of his automobile illuminated, plaintiff suddenly appeared a foot, or slightly more than a foot, in front of his automobile; that he could not stop in time to prevent hitting her.

[2] While it appears to us from a study of the record that there is a great preponderance of the evidence supporting plaintiff's contention that she was hit in the pedestrian lane, still the jury evidently believed the story of defendant that she was crossing Seventh street some dis-

tance east of the pedestrian lane and was outside of it when hit. Further, the trial judge was sitting as a thirteenth juror when hearing the motion for new trial, and as such thirteenth juror, weighed the evidence and placed his stamp of approval on defendant's testimony. There is nothing inherently improbable in the description of the accident as given by defendant. It could have happened exactly as he described it. Therefore, as the jury and the judge accepted the testimony of defendant as true, we are required to conclude that we have here a simple case of a conflict in the evidence which the triers of fact have resolved against plaintiff. Under such circumstances our opinion on the weight of the evidence can be of no assistance to either party.

Plaintiff complains of an instruction on the imminent peril rule in which was omitted the important element that a defendant must himself be free from negligence before he can avail himself of that rule. Neff v. United Railroads of San Francisco, 188 Cal. 722, 207 P. 243; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Lindley v. Southern Pacific Co., 18 Cal.App. 2d 550, 64 P.2d 490.

[3] Under the record before us we cannot regard this erroneous instruction as prejudicial because we cannot see how it could have had any bearing on the verdict, as both the jurors and the trial judge accepted the testimony of defendant as true in its entirety and rejected the evidence of all of the other witnesses to the accident. According to defendant, plaintiff suddenly appeared on the pavement about one foot in front of his automobile, so close that he had neither time nor opportunity to do anything to avoid the collison. While the sudden peril rule would seem to have no application under such circumstances, still they do not point to any fact or omission on the part of defendant that could constitute negligence.

Should we assume that the verdict in favor of defendant was based on an implied finding of the contributory negligence of plaintiff in not looking for approaching traffic after she entered the roadway of Seventh street, which she admittedly failed to do, we could not regard the erroneous instruction as prejudicial as the immediate peril rule could have little bearing on the defense of contributory negligence.

At the request of defendant the trial judge gave the following instruction:

"You are instructed that the presumption is that the defendant was innocent of wrong and also that he has obeyed the law, and the presumption in this case is that the defendant was traveling at a lawful rate of speed on the proper side of the street at all times and that his headlights complied with the law specified in the California Vehicle Code. St.1935, p. 93.

"These presumptions are in themselves a species of evidence and shall prevail and control your deliberations until and unless they are overcome by satisfactory evidence."

There has been some confusion in the decisions on the propriety of instructing the jury on the substance of section 1963, subdivision 4, of the Code of Civil Procedure. That confusion has been settled by the case of Westberg v. Willde, Cal.Sup., 94 P.2d 590, 594. That case holds that such an instruction should not be given where the party attempting to invoke it is still living and all circumstances are proved and where "all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court" because "it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence"; that it is in a case where a party has died that the presumption may come into play.

[4] We conclude that the quoted instruction should not have been given. The same is true of an instruction given at the request of plaintiff which invoked the same presumption in her favor. In the Westberg case the Supreme Court remarked that the giving of such an instruction has been held to lack sufficient prejudice to cause a reversal of the judgment, citing Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884, 886, and Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128. In the Rogers case it was said:

"We question, however, whether this error was of so serious a nature as to justify a reversal of the judgment of the trial court. As already stated, the plaintiff and other witnesses produced by him, including the occupants of his car, testified in detail as to plaintiff's acts and conduct just prior to, and at the time of, the collision. Witnesses produced by the defendant gave their version of the collision, in which they testified as to the acts and

conduct of the plaintiff in connection therewith. In the face of this direct and positive evidence, it is hardly conceivable that the jury would have placed any great reliance, if any reliance at all, on any presumption as to plaintiff's conduct, even though they were told by the court that they might do so."

We therefore conclude that the giving of the instruction was not sufficiently prejudicial to cause a reversal of the judgment, especially since a similar error was committed in favor of plaintiff and at her request.

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.




37 Cal.App.2d 264

**HALL v. KAUFMAN et al.**

**Civ. 2357.**

District Court of Appeal, Fourth District, California.

Feb. 13, 1940.

Hearing Denied April 11, 1940.

**1. Automobiles ⇐160(4)**

Where pedestrian had stepped from curb and was several feet in crosswalk when motorist stopped automobile to allow another party to pass in front of it and pedestrian at that time was at immediate right and within a very few feet of front end of motorist's automobile, motorist was obliged to yield right of way to pedestrian. Vehicle Code, § 560(a), St.1935, p. 188.

**2. Automobiles ⇐244(6)**

Evidence that motorist stopped automobile at crosswalk to allow a party to pass, but failed to see approaching pedestrian who was at immediate right and within few feet of front end of automobile at time it stopped, and who collided with side of automobile when motorist proceeded to drive through the crosswalk, sustained finding that motorist was guilty of negligence. Vehicle Code, § 560(a), St.1935, p. 188.

**3. Appeal and error ⇐999(3), 1008(1)**

Question of contributory negligence is usually one of fact for jury or court, and depends upon the circumstances.

**4. Appeal and error ⇐931(1), 989**

Where trial court has made its findings of fact from conflicting evidence, all reasonable inferences are to be indulged in favor of such findings, and power of reviewing court begins and ends with inquiry whether there is substantial evidence contradictory or uncontradictory, which in and of itself will support conclusions reached by trial court, even though it may appear to reviewing court that evidence would justify a contrary finding.

**5. Appeal and error ⇐1008(1)**

Contributory negligence of pedestrian who walked into side of automobile which approached from rear of pedestrian and to her left and made right turn across the crosswalk on which pedestrian was walking, and which had stopped to allow others who were proceeding across the walk to pass, but proceeded across the walk after pedestrian was at immediate right and within a few feet of the automobile, was for trial court as trier of facts. Vehicle Code, § 560 (a), St.1935, p. 188.

**6. Appeal and error ⇐1010(1)**

Where evidence supported fact findings of trial court in nonjury case, the findings could not be disturbed on appeal.

---

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Melvina P. Hall against Max Kaufman and another for injuries sustained when the plaintiff was struck by an automobile. From an adverse judgment, the defendants appeal.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellants.

Hervey & Holt, of San Diego, for respondent.

GRIFFIN, Justice.

This is an action for damages suffered by plaintiff when she came in contact with a motor vehicle owned by the Western States Grocery Company and driven by Max Kaufman, its employee. This action was previously before this court for consideration. Hall v. Kaufman, 30 Cal.App.2d 283,

86 P.2d 151. The judgment was reversed for failure of the trial court to find on the defense of contributory negligence. After a retrial the court, sitting without a jury, made a finding that the defendant Kaufman was negligent and that the plaintiff was free from contributory negligence and awarded a judgment for the plaintiff against defendants for the sum of $5,603.-17. From this judgment an appeal followed.

The accident occurred about 11:40 a.m., December 29, 1936, at the corner of Sixth street and Broadway in the city of San Diego. These streets intersect each other at right angles with Broadway, running east and west. Traffic is controlled by signals. Pedestrian crossing lanes are established on each of the four sides of the intersection.

The appellant Kaufman testified that he was traveling in an automobile north on Sixth street; that he approached Broadway and awaited the "go" signal for north and southbound traffic; that on the proper signal he commenced a turn on Broadway to his right or in an easterly direction; that at the edge of the north and south pedestrian crosswalk on the east side of Sixth street he stopped to let several pedestrians pass; that he started his car again, proceeded three or four feet, and stopped a second time to let a man (Mr. Haines) pass in front of his car; that he saw no one to the right of him coming towards his car; that he then proceeded a few feet on through the crosswalk; that after his car had proceeded about eight feet into the crosswalk he heard and felt an impact; and that he turned his head to the right and saw Mrs. Hall "reaching for something to hold onto". Mrs. Hall fell to the pavement and was injured.

Mr. Haines testified that he had just passed in front of appellants' car; that he was going south in the crosswalk; that appellants' car was standing still at the time; that immediately after he passed beyond the front of it he saw the car start to move easterly and that he noticed Mrs. Hall passing by him on his left going north; that he turned his head and saw her "going against the car; * * * that I turned in time to see her struck by the front fender of the automobile; that she went against the front door of the car; that she threw her head back and fell; that she came in contact with the 'side of the car at the front door'."

Respondent Mrs. Hall testified that she was 72 years of age and that her eye-sight was impaired to some extent. She said: "I had near-sighted eyes, also I had a stigmatism; I had had my right eye operated on, and Dr. Bond (in 1935) had changed the lens to that eye." As to the left eye she testified: "It was getting a little dim; I could see objects; I could not distinguish detail. * * * I could have seen your face, but I could not tell you the color of your eyes." She further testified that she stepped off the curb on the southeast corner of Sixth and Broadway when the "go" signal rang, and walked northerly to cross the street in the marked crosswalk; that she looked to her left and to her right just as she stepped off the curb, and thereafter looked straight ahead and proceeded in that direction; that she did not see any car near her; that after she progressed about eight or ten feet she came in contact with the body of a car; that the impact of the car turned her around to her right; that she was thrown out of balance and fell to the pavement; that the fall caused considerable injury to her left shoulder. She further testified that "when I was hit I didn't know up to that time what had happened, I didn't know what was happening to me because it was all done so quickly, then when I struck the automobile I realized I was in danger".

We believe this to be a fair statement of the entire evidence relating to the accident and injury. There is little if any conflict in the testimony of the witnesses.

It is appellants' contention that the record nowhere discloses any negligence whatsoever on the part of the appellant Max Kaufman, in proceeding through the intersection where the accident complained of happened and that the evidence clearly discloses that Mrs. Hall, in proceeding into the intersection, after looking but once, and walking directly into appellants' car, was guilty of such contributory negligence as would preclude any recovery by her.

[1] Section 560, subdivision (a) of the Vehicle Code 1935, St. 1935, p. 188, provided: "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *". It can be reasonably interpreted from the evidence that respondent had stepped from the curb and was several feet in the crosswalk when appellant stopped his car to allow the wit-

ness Haines to pass in front of it. The evidence seems clear that respondent at that time was at the immediate right of and within a very few feet of the front end of appellants' car. Applying the rule above stated, under these facts appellant was obliged to yield the right of way to the respondent. Lowell v. Harris, 24 Cal.App. 2d 70, 83, 74 P.2d 551; People v. McLachlan, Cal.Super., 93 P.2d 280; Mitrovitch v. Graves, 25 Cal.App.2d 649, 78 P.2d 227; Thompson v. Baldwin, 26 Cal.App.2d 703, 80 P.2d 198.

[2] It is also established that appellant did not see respondent in the crosswalk at that time, although she must have been there. There is sufficient evidence to justify the finding of the trial court that the appellant driver therefore was negligent.

As to the question of contributory negligence of respondent a much closer question presents itself. The evidence, when considered as a whole, rather indicates that respondent walked into the side of the passing automobile. Respondent, however, argues that the evidence would justify the conclusion, as found by the trial court, that she looked before entering the crosswalk and that she observed no oncoming vehicle approaching from her left; that she followed other pedestrians in the crosswalk who were properly crossing the street with the "go" signal; that appellants' car rounded the turn at the southeast corner while she was in the crosswalk and that due to the fact that appellant approached from the rear and to her left, and to the further fact of her relative position to the witness Haines, she was unable to observe the car; that the front of the car extended farther from the curb into Broadway than the right rear portion, due to the curved approach to the crosswalk; that although the front portion of the right fender missed her she was struck by that portion of the fender attached to the running board; and by reason of appellant's failure to observe her there in the crosswalk she was negligently struck down and injured by the force of the moving automobile.

[3] At the outset we may say, had the trial court found that respondent was guilty of contributory negligence under the facts related, we would have no hesitancy in holding that the evidence fully supported such finding, but that is not the question before us. Can we now say from the evidence, in the face of the finding that respondent was not guilty of contributory negligence, that the evidence considered in its most favorable light, established contributory negligence as a matter of law? There are cases upholding findings of contributory negligence where a pedestrian walked into the side of a passing car and outside of a pedestrian crosswalk. Francis v. Riddle, 15 Cal.App.2d 282, 59 P.2d 532; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Ramsperger v. Los Angeles M. C. Co., 4 Cal.App.2d 673, 41 P.2d 562; It is fairly well established that the question of contributory negligence is usually one of fact for the jury or court and must depend on the circumstances in each particular case. Francis v. Riddle, supra.

In Naudack v. Canini, 29 Cal.App.2d 687, 85 P.2d 510, 515, the court said: "As to the question of contributory negligence of respondent, it appears that under the more recent decisions of the courts of this state that question must be deemed to be one of fact for the determination of the jury. * * * 'Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court. [Citing cases].'"

See, also, Thompson v. Baldwin, supra; King v. Unger, 25 Cal.App.2d 632, 78 P.2d 255; Gustafson v. Blunk, 4 Cal.App.2d 630, 41 P.2d 953; Clark v. Bowers, 116 Cal.App. 88, 91, 2 P.2d 486; Bogan v. White, 137 Cal.App. 150, 152, 30 P.2d 429.

[4-6] It is settled that when a trial court has made its findings of fact from conflicting evidence all reasonable inferences are to be indulged in favor of such findings, and that the power of a reviewing court begins and ends with the inquiry whether there is substantial evidence, contradictory or uncontradictory, which in and of itself will support the conclusions reached by the trial court, even though it may appear to us that the evidence would justify a contrary finding. There is evidence in the case at bar to support the findings of the trial court; consequently, they cannot be disturbed. Grant v. Ryon, 11 Cal.App. 2d 101, 53 P.2d 170.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

37 Cal.App.2d 327

**Ex parte LAZAR.**

**Cr. 2114.**

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1940.

**1. Divorce ⇐11**

The state, while not a party in a divorce action, has an interest in the contract and relationship of marriage which is not subject to dissolution upon the whim or caprice of one of the contracting parties, or even upon their mutual consent.

**2. Divorce ⇐12**

A marriage may be dissolved only for causes sanctioned by law.

**3. Divorce ⇐236, 249(2)**
**Husband and wife ⇐278(1)**

Separation agreements involving property settlements are valid, but in a subsequent divorce proceeding, if any provision of such agreement does not meet with the court's approval, the decree may be framed in conformity with the court's view, irrespective of any provision in the private prior agreement. Civ.Code, §§ 146–148, 158, 159.

**4. Divorce ⇐236, 249(2), 269(2)**

The court had power to approve, disapprove, amend, or reform terms of a separation agreement, when made part of or embodied in an interlocutory divorce decree, and if there is an order to pay money, court has power thereafter to enforce such order by contempt proceedings. Civ.Code, §§ 146–148, 158, 159.

**5. Divorce ⇐269(2)**

If provision in divorce decree does not expressly or impliedly recite an order to pay money, proceedings in contempt will not lie.

**6. Divorce ⇐269(2)**
**Husband and wife ⇐299(4)**

An order directing payment of alimony, maintenance or support, or one directing settlement of separate property rights, may be enforced by imprisonment.

**7. Divorce ⇐269(2)**

The state has an interest in marriage contract which warrants extraordinary means for enforcement of terms of dissolution of the marriage.

**8. Husband and wife ⇐4**

A husband and wife contract toward each other obligations of "support," which is synonymous with "maintenance." Civ. Code, § 155.

[Ed. Note.—For other definitions of "Maintenance" and "Support," see Words & Phrases.]

**9. Constitutional law ⇐83(3)**
**Divorce ⇐209, 231**

"Alimony" is an allowance for the support and maintenance pending or subsequent to divorce, and does not constitute a "debt" within meaning of constitutional provision prohibiting imprisonment for debt. Const. art. 1, § 15.

[Ed. Note.—For other definitions of "Alimony" and "Debt," see Words & Phrases.]

**10. Divorce ⇐269(2)**

The enforcement of a former marital obligation, the execution of which after dissolution of marriage becomes a public duty, may be enforced by contempt proceeding.

**11. Divorce ⇐269(2)**

Where divorce decree directed husband to pay certain amount as monthly installments in part settlement of community assets, he was punishable for contempt for failure to obey such decree.

---

Habeas corpus proceeding by Siegbert Lazar.

Writ discharged and prisoner remanded.

Grover O'Connor, of San Francisco, for petitioner.

Eric J. Robertson, of San Francisco, for respondent.

WARD, Justice.

Petition for writ of habeas corpus seeking relief from an order adjudging petitioner to be in contempt of court for failure to comply with the terms of a decree of divorce requiring him to make certain payments to his former wife.

On November 30, 1936, petitioner and his wife, from whom he was separated, entered into an agreement providing for a final and complete settlement between them of all questions of property rights, separate maintenance, alimony, etc., without respect to any action or suit which might thereafter be brought by either party. Among other things, it was provided that the wife should have exclusive possession and ownership of certain household furnishings and money in her possession and on deposit in banks

with which she "is or has been transacting business"; that the husband should have the exclusive possession and ownership of certain household and office furnishings, medical equipment, musical instruments, stamp collection, a life insurance policy, automobile, certain business accounts and notes, debts and obligations receivable, and any money in any bank or banks with which he "is or has been transacting business". A short time thereafter, the parties were granted an interlocutory decree of divorce which provided: "It Is Further Ordered, Adjudged and Decreed that that certain agreement in writing, dated November 30, 1936, by and between the plaintiff and defendant be and it is hereby approved and made a part of this decree, and the property rights of the parties as set forth in said agreement be, and they are hereby approved, and the community property of said parties is hereby distributed to them in accordance with the terms of said agreement." Following out the terms of the agreement, under the heading: "The plaintiff shall have as her separate property * * *", the decree, after disposing of certain furnishings, cash on deposit, etc., provided: "In addition, plaintiff shall have, and defendant shall pay to her, the sum of One Hundred and Thirty Dollars ($130.00) on or before December 31, 1936, and a like sum on or before the last day of each calendar month thereafter during the lifetime of plaintiff, or until the remarriage of plaintiff * * *", the court thereby in express terms as part settlement of the community property ordering the payment thereof. In the second to the last paragraph, the decree stated: "It Is Further Ordered, Adjudged and Decreed that the plaintiff is not entitled to maintenance, support or alimony, and no award therefor is made to her." One year later a final decree, confirming the interlocutory, was rendered in the action. Subsequently the defendant husband was cited for contempt for failing to make payments as above provided.

During the hearing on the order to show cause, it developed that the husband, then in default on the above payments, had in his possession the sum of $72, whereupon the court ordered him to pay to the wife the sum of $35.00. The husband refused to comply with the order and the court immediately adjudged him in contempt.

[1, 2] The state, while not a party in a divorce action, has an interest in the contract and relationship of marriage, which is not subject to dissolution upon the whim or caprice of one of the contracting parties or even upon their mutual consent. It may be dissolved only for causes sanctioned by law. In Grannis v. Superior Court, 146 Cal. 245, 252, 253, 79 P. 891, 894, 106 Am. St.Rep. 23, the court said: "The parties to such an action have not the right to control procedure as in other actions. The court is not bound by admissions in the pleadings, nor by the stipulations of the parties, nor is its inquiry as to the facts limited by the pleadings. * * * The rule in actions affecting property, that the parties interested may control the disposition of the interests involved, and that the judgment of the court will be made to conform to such dispositions, when ascertained, has no application to divorce cases." Greenhood on Public Policy, 490; Roberts v. Roberts, 83 Cal. App. 345, 256 P. 826; Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am.St.Rep. 73; Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654.

[3-5] Separation agreements involving property settlements are valid in California (Civ.Code, §§ 158, 159; Fitch v. Tyler, 105 Cal.App. 306, 288 P. 74), but in a subsequent divorce proceeding, if any provision of such agreement does not meet with the approval of the court, the decree will be framed in conformity with the court's views irrespective of any provision in the private prior agreement. Civ.Code, §§ 146, 147, 148; Smith v. Smith, 94 Cal.App. 35, 270 P. 463; Moog v. Moog, 203 Cal. 406, 264 P. 490; Wallace v. Wallace, 136 Cal. App. 488, 29 P.2d 314; Robertson v. Robertson, Cal.App., 93 P.2d 175; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540. The court has power to approve, disapprove, amend or reform the terms of an agreement when made a part of or embodied in an interlocutory decree, and if there is an order to pay money, thereafter to enforce such order by contempt proceedings. Seymour v. Seymour, 18 Cal.App.2d 481, 64 P.2d 168; Miller v. Superior Court, supra; Liles v. Superior Court, 19 Cal.App. 2d 506, 65 P.2d 920. If the provision in the decree does not expressly or impliedly recite an order "to pay", proceedings in contempt do not lie. Baxter v. Baxter, 3 Cal. App.2d 676, 40 P.2d 536 and cited cases. The validity of the order in the decree directing the payment of $130 monthly is not questioned.

[6] Petitioner contends that the contempt order results in imprisonment for debt. It is frankly conceded that the order here attacked would be proper if made expressly or impliedly for nonpayment of alimony, maintenance or support. The violation of an order of the character last mentioned, or one directing the settlement of separate property rights, may be enforced by imprisonment. Miller v. Superior Court, supra. The order adjudging petitioner guilty of contempt does in fact recite that the order for the payment of $130 a month was for "support and maintenance", but the commitment is based upon "failure to make payments as provided in the final decree and judgment". Inconsistent and contradictory statements are found in the agreement and in the decree, but a fair interpretation to be placed upon the language of the interlocutory decree, and confirmed in the final, which is the basis for the contempt charge, is that, by the court's insertion in the decrees of the disposition to be made of the wife's separate interests, including the payment of the sum monthly, it was intended to make the order relative thereto an order determining the separate property of the wife as distinguished from the usual order for alimony. The question therefore arises, may the court, through contempt proceedings, make effective an order assigning certain property to one spouse as separate property, the order having further directed a compliance therewith?

[7] An ordinary judgment does not order the party against whom it is directed "to pay" anything. An award of support for an innocent spouse in a divorce proceeding is a command directed to the other spouse "to pay". The reason for the mandatory language in the judgment in a divorce proceeding is that the state has an interest in the marriage contract which warrants even extraordinary means for enforcement of the terms of the dissolution of the marriage. Property settlements often involve provisions regarding future support. To hold in decrees directing a party "to pay", or its equivalent, that contempt does not apply, would result in making that portion of the decree settling property rights inert and impotent. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252.

[8, 9] A husband and wife contract toward each other obligations of support. Civ.Code, § 155. "Support" in this sense is synonymous with maintenance. Alimony is an allowance for support and maintenance pending or subsequent to divorce. It does not constitute a debt within the meaning of the constitutional provision prohibiting imprisonment for debt. State Const., art. 1, § 15; Miller v. Superior Court, supra. A decree for alimony or allowance is an order to compel one spouse to support the other. It is an order for the protection of one of them, and its violation is punishable, not for failure to pay an adjudicated amount as in all ordinary judgments, but for failure to obey the order of the court. With this in mind, it is immaterial whether the decree designates alimony, maintenance or support, or, as in the present case, is an order directing that in the disposition of the property of the spouses the husband should be entitled to "accounts and notes receivable, including all debts and obligations to the defendant owing" from any source, and that the wife should have as her separate property $130 a month during her lifetime or until marriage.

[10, 11] The court ordered that each party should have as separate property certain personal effects, impliedly directing the delivery by each side of the respective articles. If either party had refused to deliver the specified articles to the other, could it be said that contempt proceedings would not be available? If the wife had arbitrarily seized the automobile, declared in the decree to be the separate property of the husband, would it have been necessary to resort to a separate action to recover the machine? Separate property is generally given to each spouse as a means of support, and the arm of the law may reach out directly to enforce a former marital obligation, the execution of which, after dissolution of the marriage, becomes a public duty. The provision disposing of separate property is embodied in a decree, with a direction "to pay" or its equivalent. It therefore has the "compelling power of the court behind its every covenant". Tripp v. Superior Court, supra [61 Cal.App. 64, 214 P. 253]; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645. In Schnerr v. Schnerr, 128 Cal. App. 363, 17 P.2d 749, an order was made directing the husband to pay money to the wife upon a property settlement not made a part of the decree. The order was reversed because not founded on the decree itself, but upon a subsequent order, and for the additional reason that the decree did not impose a duty upon the husband. In the Schnerr case, in discussing Tripp v. Superior Court, supra, the court said (128 Cal.

App. page 367, 17 P.2d page 750): "In support of the order appealed from plaintiff relies mainly on the case of Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252, 253. But in that case, unlike the present one, the agreement between the parties was set out in full in both decrees, and by express provision was made a part thereof. The duty imposed upon the defendant was, therefore, readily ascertainable from the decrees themselves." In this case the duty of the defendant, petitioner herein, is readily ascertainable from the order directing him to pay a certain amount as monthly installments in part settlement of community assets, and for his failure to obey such order, not his failure to pay a judgment, he is punishable for contempt.

The writ is discharged and the prisoner remanded.

We concur: PETERS, P. J.; KNIGHT, J.




37 Cal.App.2d 269

**DAVIS v. MORRIS et al.**

**Civ. 6231.**

District Court of Appeal, Third District, California.

Feb. 13, 1940.

Rehearing Denied March 14, 1940.

Hearing Denied April 11, 1940.

**1. Mines and minerals ⇐97**

Evidence that defendants held lease of gold mine which they operated under written agreement providing for limitation of liability in sum of $250 on each defendant, and that defendants were to share equally in cost of machinery and equipment purchased, and were to participate equally in profits and losses of business, established that defendants were maintaining a "mining partnership," so as to make each defendant jointly and severally liable for wages of superintendent of mine. Civ.Code, §§ 2511–2513.

[Ed. Note.—For other definitions of "Mining Partnership," see Words & Phrases.]

**2. Mines and minerals ⇐99(3)**

Where members of mining partnership were sued as joint and several debtors, trial court properly rendered judgment against them as such, notwithstanding members were not sued as a partnership. Civ.Code, §§ 1659, 2511–2513.

**3. Mines and minerals ⇐99(3)**

As members of mining partnership each defendant was liable for obligations of enterprise, and each defendant thereby became agent of enterprise with authority to bind it in usual manner for all purposes for which it was organized. Civ.Code, §§ 2403, 2511–2513.

**4. Mines and minerals ⇐99(3)**

Where members of mining partnership knew of employment of plaintiff as superintendent of mine at $10 per day and saw him working in the mine, and plaintiff had no knowledge of provisions in partnership agreement limiting liability against each partner to $250, members were "estopped" from denying liability for plaintiff's wages, notwithstanding aggregate amount of wages exceeded limitation of liability expressed in agreement. Civ.Code, §§ 2511–2513.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

**5. Mines and minerals ⇐99(3)**

Where employment of plaintiff as superintendent of mine was within purpose for which mining partnership was organized and maintained, and all members of partnership knew of employment, partnership was bound by obligation to pay plaintiff's agreed wages, even though his employment was not specifically approved by each member. Civ. Code, §§ 2403, 2511–2513.

**6. Master and servant ⇐69**

The statute imposing penalty on employer for willful failure to pay wages of an employee immediately upon his discharge is valid. St.1937, p. 197, §§ 201–203.

**7. Appeal and error ⇐1011(1)**

Whether members of mining partnership were acting in good faith in claiming that wages were not due superintendent of mine because superintendent contributed his services as member of partnership, so that members were not subject to penalty for willful failure to pay wages, was for trier of facts, and appellate court would not interfere with trial court's conclusion, where there was conflict of evidence in such regard. St.1937, p. 197, §§ 201–203.

**8. Master and servant ⇐83**

The term "willful," as used in statute imposing penalty on employer for willful failure to pay wages of an employee immediate-

ly upon his discharge, does not mean that refusal to pay wages must necessarily be based on deliberate evil purpose to defraud workmen of wages which employer knows to be due, but means that employer intentionally fails or refuses to perform an act which is required to be done. St.1937, p. 197, § 203.

In civil cases, the word "willful" does not necessarily imply anything blamable or any malice or wrong toward other party, or perverseness or moral delinquency, but merely that thing done or omitted to be done was done or omitted intentionally.

[Ed. Note.—For other definitions of "Willful; Willfully," see Words & Phrases.]

**9. Master and servant ⇐83**

A superintendent of mine was an "employee" within statute imposing penalty on employer for willful failure to pay wages of employee immediately upon his discharge. St.1937, p. 197, §§ 201–203.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by I. L. Davis against Edward Morris and others, as members of a mining partnership, for unpaid wages of a superintendent of the enterprise, together with penalty for willfully failing to pay wages. From a joint and several judgment in favor of plaintiff against defendants, defendants appeal.

Affirmed.

Dennett & Zion, of Modesto, for appellants.

Gumpert & Mazzera, of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

A joint and several judgment was rendered against the appellants, as members of a mining partnership, for unpaid wages of a superintendent of the enterprise, together with a penalty for wilfully failing to pay the same as provided by section 203 of the Labor Code of California. St.1937, p. 197. From that judgment this appeal was perfected.

It is contended the judgment is not supported by the evidence; that the wages were not due, for the reason that the plaintiff merely contributed his services as a member of the partnership; that the written agreement of partnership establishes a limitation of liability against each partner, and that the penalty imposed is not warranted because the failure to pay the wages was not "wilful" since, in good faith, the defendants believed they were not due to the superintendent who contributed his services as a member of the partnership.

The defendants held a lease of the Moccasin Gold Mine near Coulterville in Tuolumne county, which they operated under a written agreement of partnership for a period of time. The agreement, which was dated February 27, 1937, was signed by each of the defendants, but it was not recorded. It was not signed by the plaintiff. He had no knowledge of that agreement. It provided for a limitation of liability in the sum of $250 on the part of each partner. The agreement further provided that the partners were to share equally in the cost of machinery and equipment to be purchased for an aggregate amount not to exceed $3,000. They were to participate equally in the profits and losses of the business.

Regarding their interest in the mine, Mr. Morris testified: "We had a lease * * * to explore for gold ore." He said the partners had "a mutual arrangement of equal interest (in the mine) of each one of five men." They agreed to subsequently incorporate the enterprise, but the record fails to show that the corporation was ever perfected.

Regarding the employment of plaintiff as a superintendent there is a conflict of evidence. But there is adequate proof that he was so employed at an agreed compensation of $10 per day. All of the partners knew of that employment and saw him working in the mine. Several workmen, other than the superintendent, were also employed in the mine. A shaft was sunk and a tunnel was extended. Quartz was extracted and numerous tests were assayed and reported to the partnership under the direction of the plaintiff. He supervised the workmen and kept the payroll accounts. The plaintiff worked in the mine as supervisor eighty-six days from April 5, 1937, to July 17, 1937, upon which last-mentioned date the mine was "shut down" by the appellants. He was paid on account of his claim for wages only the sum of $150. The evidence clearly shows that the plaintiff was not a member of the

mining partnership. He said in that regard: "I didn't know anything about their financial setup. I didn't know how much money they had in there, or anything about it." He testified that he was not a member of the partnership, and that he took no part in organizing the mining enterprise; that he was merely hired to act as their superintendent. He was a skilled miner, having had many years of experience as a mining superintendent.

[1-3] The written agreement between the defendants, and the evidence disclosed by the record clearly indicate that the enterprise which the appellants were maintaining was a mining partnership operated under the fictitious name of Moccasin Mining Company. Secs. 2511–2513, Civ.Code; Treat v. Murdock, 8 Cal.2d 316, 65 P.2d 881; Michalek v. New Almeden Co. Inc., 42 Cal.App. 736, 184 P. 56. It is immaterial that the defendants were not sued as a partnership. They were sued as joint and several debtors, and the court properly rendered judgment against them as such. Sec. 1659, Civ.Code. As members of the mining partnership each defendant was liable for the obligations of the enterprise. Each member thereby became the agent of the enterprise with authority to bind it in the usual manner for all purposes for which it was organized. Sec. 2403, Civ. Code; First National Bank of Dixon v. Spangler, 49 Cal.App. 133, 192 P. 874; Jacobson v. Lamb, 91 Cal.App. 405, 410, 267 P. 114. The court therefore properly rendered judgment against the defendants jointly and severally.

[4] There is substantial evidence that the plaintiff was not a member of the mining partnership, and that he had no knowledge of the provision in the written agreement which specified a limitation of liability of $250 against each partner. Moreover, the partners apparently disregarded that limitation, and by common agreement, incurred indebtedness beyond that sum. They all knew of the employment of the plaintiff at $10 per day, and saw him working in the mine. Their conduct constituted a tacit approval of his employment, even though the aggregate amount of his wages exceeded the limitation of liability expressed in their written agreement of partnership. They are estopped from denying liability for that obligation. With respect to defendants' disregard of the limitation of the amount of indebtedness authorized by the terms of the written agreement, and regarding their approval of plaintiff's employment, Mr. Morris testified:

"Q. Did each of you put up any money in connection with this arrangement? A. Yes we did.

"Q. Do you know about how much? A. Oh, I don't think I could give you the exact sum; *several hundred dollars.* * * * *We started off with a fixed amount and that varied as times went on and the obligations grew.* * * *

"Q. Were there any meetings or discussions held by these defendants, including yourself, after Mr. Davis had gone to work, regarding payment of his $10.00 per day? A. Yes, there were discussions.

"Q. And I take it at those discussions the entire group were present? A. Well, not always. Maybe sometimes. * * * We were more or less left with the responsibility. * * * On some occasions we had very formal meetings in which the matters of finances and obligations were fully discussed."

[5] The employment of the plaintiff as superintendent of the mine was apparently within the very purpose for which the enterprise was organized and maintained, and the partnership is therefore bound by the obligation to pay his agreed wages. Even though his employment was not specifically approved by each member of the partnership, the contract of one of them would bind each member of the organization. Sec. 2403, Civ.Code.

The appellants contend that under the circumstances of this case the court was not authorized by section 203 of the Labor Code to impose the penalty of thirty days' pay at the rate of the per diem wages, aggregating the sum of $300, for the reason that the defendants, in good faith, believed that he was not entitled to wages, because he was a partner with them in the mining enterprise, and merely contributed his services as a superintendent on account of that relationship. That section provides in part: "If an employer wilfully fails to pay, without abatement or reduction, in accordance with Sections 201 and 202, any wages of an employee who is discharged *or who quits,* the wages of such employees shall continue *as a penalty* from the due date thereof at the same rate until paid or

until an action therefor is commenced; but such wages shall not continue for more than thirty days. * * *"

[6, 7] The statute clearly imposes the penalty for wilful failure to pay the wages of an employee immediately upon his discharge, pursuant to section 201 of the same code. Such penalties have been frequently upheld as valid. Manford v. Singh, 40 Cal.App. 700, 181 P. 844; 14 McKinney's New Cal.Dig., 371, sec. 15; Chicago, Rock Island & Pac. Ry. Co. v. Russell, 173 Ark. 398, 292 S.W. 375, 51 A.L.R. 1206, and note. That statute has been held to be constitutional. Manford v. Singh, supra. The legislature has seen fit to impose the penalty for wilful failure to pay wages when they are due. We may not question the propriety of that legislation. The trial court specifically found that the defendants *wilfully* failed to pay the wages when they were due. That finding is supported by substantial evidence. It was the sole province of the trial court to determine whether the defendants were in good faith in claiming that wages were not due because the plaintiff contributed his services as a member of the partnership. That issue was decided against them. With that conclusion we may not interfere, since there is a conflict of evidence in that regard.

[8] The term "wilful", as it is used in section 203 of the Labor Code, does not mean that the refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due, in order to subject him to the penalty. In the case of May v. New York Motion Picture Corporation, 45 Cal.App. 396, 404, 187 P. 785, 788, it was held that the term "wilful" in its ordinary use, merely means that one intentionally fails or refuses to perform an act which is required to be done. It is said in that regard: "In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." Citing cases.

[9] There is no merit in the contention that because the plaintiff was a superintendent in the mine, as distinguished from an ordinary laborer, that he was therefore not such an "employee" as is entitled to the penalty provided for by the terms of section 203, supra. Christie v. Commercial Casualty Ins. Co., 6 Cal.App. 2d 710, 715, 45 P.2d 263. It was there held that a foreman of construction work came within the term of workmen or laborers. Moreover, section 203, supra, is much broader in its application than the mere use of the term "workmen". It applies the penalty to a wilful failure to pay "an employee". We have no doubt that term includes the superintendent in a mine.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




37 Cal.App.2d 305

## BUJULIAN v. CONSOLIDATED IRR. DIST.

Civ. 2535.

District Court of Appeal, Fourth District, California.

Feb. 14, 1940.

**Appeal and error ⇐627(2)**

Where order terminating proceedings for preparation of a transcript had become final, no transcript had been prepared or filed, and no appearance made by appellant in response to notice of motion to dismiss appeal, appeal would be dismissed.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Hagop Bujulian against the Consolidated Irrigation District. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

No appearance for appellant.

Harris, Willey & Harris, of Fresno, for respondent.

BARNARD, Presiding Justice.

The respondent has moved to dismiss the appeal on the ground that no tran-

script has been filed and that the time for preparing a record has expired.

It appears from the certificate of the county clerk that judgment was entered on June 5, 1939; that a motion for new trial was denied on August 4, 1939; that notice of appeal and notice to the clerk to prepare a transcript was filed on August 17, 1939; that on September 29, 1939, an order was made terminating proceedings for the preparation of a transcript; that that order has not been appealed from and that no proceedings are pending for the settlement of a bill of exception or for the preparation of a transcript on appeal.

The order terminating proceedings for the preparation of a transcript having become final, no transcript having been prepared or filed, and no appearance having been made by the appellant in response to notice of this motion, the motion to dismiss the appeal must be granted. Olinger v. Pacific Greyhound Lines, 18 Cal.App. 2d 104, 62 P.2d 1406; Wood v. Peterson Farms Company, 131 Cal.App. 312, 21 P. 2d 468.

The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.




37 Cal.App.2d 181

**In re WILLIAMS' ESTATE.**

**STATE v. KOCH et al.**

Civ. 6315.

District Court of Appeal, Third District, California.

Feb. 6, 1940.

**1. Executors and administrators ⇐315(6)**

Where testatrix directed that residue remaining on termination of a testamentary trust should be paid to "any of my heirs" then living, original decree of distribution finding that "only heirs" were testatrix' three children did not "estop" collateral heirs on death of such children from maintaining that they were heirs of testatrix entitled to residue of trust under escheat statute, since the original decree did not adjudicate who would be the heirs at the termination of the trust, and such fact could not be determined until the termination of the trust. Code Civ.Proc. § 1272; § 1272a, as amended by St.1939, p. 1456.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

**2. Trusts ⇐331**

Where testatrix directed that residue remaining on termination of a testamentary trust should be paid to "any of my heirs" then living, and on settling the final account of trustee no notice was served upon collateral heirs of the testatrix and the only notice given was by posting for ten days a notice in the courthouse, decree that there were no heirs of testatrix and that residue of estate should be distributed to state did not "estop" collateral heirs from claiming under escheat laws residue of estate, since purpose of escheat statute is to permit heirs unknown at time of distribution to establish right to such property. Code Civ.Proc. § 1272; § 1272a, as amended by St.1939, p. 1456.

**3. Descent and distribution ⇐71(4)**

There is a presumption of law that every intestate has left some one on earth entitled to claim as his heir, however remote.

**4. Escheat ⇐8(2)**

The purpose of the escheat statute is to permit heirs who were unknown at the time of the distribution to subsequently establish their right to property distributed to the state for lack of "known heirs." Code Civ. Proc. § 1272; § 1272a, as amended by St. 1939, p. 1456.

**5. Escheat ⇐8(2)**

Where testatrix directed that residue remaining on termination of testamentary trust should be paid to "any of my heirs" then living, and on trustee's final account court decreed that there were no heirs and that the residue should be distributed to the state, collateral heirs had right to proceed under escheat statute to establish their right to the property distributed to the state for lack of known heirs, and fact that title had vested in state did not bar their rights. Code Civ.Proc. § 1272a, as amended by St. 1939, p. 1456.

**6. Courts ⇐475(2)**

Where residue of a testamentary trust was on trustee's final account distributed to the state for lack of known heirs, superior court of Sacramento county had jurisdiction to determine the matter of heirship in

proceeding under escheat statute by collateral heirs, and right to maintain the action was not affected by any prior proceedings in San Francisco county. Code Civ.Proc. § 1272; § 1272a, as amended by St.1939, p. 1456.

**7. Escheat ⇐8(2)**

Where trustee of a testamentary trust, providing that residue should be distributed "to any of my heirs" living on termination of trust, filed final account claiming there were no heirs, and Attorney General intervened asking for distribution to the state and court decreed that there were no heirs and distributed residue to the state, intervention of the Attorney General in proceedings did not give state any right to residue that it did not have under escheat statute, as respects right of collateral heirs to establish right to residue. Code Civ.Proc. §§ 1269, 1272; § 1272a, as amended by St.1939, p. 1456.

**8. Escheat ⇐8(2)**

Where testatrix directed the residue remaining on termination of testamentary trust should be paid to "any of my heirs" then living, and on final account by trustee court distributed residue to the state on ground that there were no heirs, admitted collateral heirs of testatrix were entitled to recover from the state property so distributed to it. Code Civ.Proc. § 1272; § 1272a, as amended by St.1939, p. 1456.

Appeal from Superior Court, City and County of Sacramento; Malcolm C. Glenn, Judge.

Proceeding in the matter of the residue of the estate of Ellen Mary Williams, deceased. Action by Herman A. Koch, as administrator of the estate of John O'Sullivan, deceased, and others, against the State of California to recover money paid into the state treasury under an order of the court. From a judgment for the plaintiff, the State appeals.

Affirmed.

Earl Warren, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for appellant.

C. H. S. Bidwell and E. Hendricksen, both of Sacramento, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action brought by the heirs and representatives of the heirs of Ellen Mary Williams, deceased, under the provisions of sections 1272 and 1272a of the Code of Civil Procedure, to recover money paid into the state treasury under an order of court in the estate of said deceased. The trial court found that respondents were entitled to recover, and judgment was entered accordingly. The State now appeals from said judgment.

Ellen Mary Williams died testate in the city of San Francisco on the 29th day of July, 1914, leaving surviving her as her next of kin three children, George A. Williams, John S. Williams and Grace Morford. In due course her estate was probated in the superior court of San Francisco, and in 1915 the said superior court made and entered its decree of distribution, distributing the property of the estate according to the terms of the will of Ellen Mary Williams and naming as her only heirs her said three children above named. The will of said deceased contained several bequests in which we are not interested in this case. But the will made two bequests to the Union Trust Company of San Francisco of five thousand dollars each in trust for two of her children, which were distributed by the decree in the following words: "I give, devise and bequeath to the Union Trust Company of San Francisco the sum of Five Thousand ($5000.00) Dollars in trust nevertheless for the use and benefit of my son, John S. Williams, and I direct that my said trustee shall invest the said trust fund as a deposit in the savings department of said trustee's bank, and that the said trust fund be paid by my said trustee to my said son, John S. Williams, as follows, to-wit: Fifty ($50.00) Dollars a month on the first day of each and every month from and after the distribution of my estate until the full principal sum and interest thereon shall have been paid to the said John S. Williams, if he shall so long live, and in the event of his death before the payment to him of the full amount herein and hereby directed to be paid to him by said trustee, then any balance remaining unpaid I direct my said trustee to pay in the same amounts and at the same times, and in the same manner above provided to my daughter Grace Morford, nee Williams, of the City of Sacramento, State of California, the wife of Arthur Morford, if she be then alive, until the full sum provided to be paid has been paid, if she so long live and in the event of her death prior to such payment, the balance undisposed. I direct my said trustee to pay to any of my heirs then living in such manner as is by law provided."

All of the children of Ellen Mary Williams died within a few years. Following the death of John, the last surviving son, and on June 14, 1930, the Wells Fargo Bank and Union Trust Company of San Francisco, successor to the Union Trust Company, duly qualified, appointed and acting trustee under the last will and testament of Ellen Mary Williams, deceased, made its final report and account of the administration of said trust, and presented the same to the court for settlement of said account and petitioned for a decree of the court terminating the trust and distributing the trust fund in its hands. Said petition recited that the terms of the trust in the will of Ellen Mary Williams had been carried out by the trustee, and that all and every direction contained therein had been complied with and executed by the trustee, and that "the trust is in a condition to be closed and terminated". It then alleged that the petitioner was informed that there were no heirs at law of said Ellen Mary Williams, deceased, and no person to claim the residue of said trust funds remaining in the hands of the petitioner. The prayer of the petition sought an order and decree settling the trustee's account, an order and allowance for reasonable trustee and attorney services, a decree terminating the trust and directing the trustee to pay the balance of the trust fund remaining to the credit of the estate "to whomsoever may be entitled thereto". The State of California thereupon filed a petition in intervention and asked for distribution to the state, alleging: "that there are no persons entitled to distribution of decedent's trust estate, and therefore * * * that the State of California is a party in interest in the said estate, which is about to, and should escheat to the State of California."

Upon the matter regularly coming on for hearing the court, in the city and county of San Francisco, executed and made its decree settling the final account of the trustee and distributing the residue of the estate to the State of California, the decree reciting: "It is further ordered, adjudged and decreed, and the court so finds, that there are no heirs at law of said Ellen Mary Williams, deceased, and there was no such heir surviving at the time of the death of said John S. Williams, the surviving beneficiary under said trust; and that the residue of said trust estate, after payment of expenses of administration, be, and the same is hereby distributed to the State of California, said residue being the sum of $6371.94, which, less expenses, leaves a balance for distribution to said State of $5121.94 under the laws of said State in such cases made and provided."

The money so distributed to the State of California was deposited pursuant to said decree, in the state treasury. Approximately two years later and on the 31st day of March, 1932, a citation was issued by the superior court in and for the county of Sacramento, pursuant to section 1272 and section 1272a of the Code of Civil Procedure of this state, requiring the attorney-general and the State of California to appear and show cause why the money paid into the state treasury should not be paid to petitioners upon the ground that they were the heirs at law of the decedent.

It is conceded by the State that at the time of the death of the surviving son, John, there were living, John O'Sullivan, Cornelius O'Sullivan, and Kate Cotter, brothers and sisters of said Ellen Mary Williams, deceased, who are here represented by an administrator, and the other respondents named in the proceeding, who are nieces and nephews of said decedent. It thus appears that the respondents are all collateral heirs of Ellen Mary Williams, deceased.

[1] It is first contended by the State that the original decree of distribution found that the only heirs of Ellen Mary Williams, then living, were her three children; that this is a final adjudication to the effect that these respondents were not her heirs; that the latter are estopped from here maintaining that they are heirs of Ellen Mary Williams, and that upon the death of the last beneficiary under the will, son John, the residue of the estate in trust was bona vacantia, and should therefore escheat to the State of California. We are unable to agree with this narrow construction of the word "heirs". It is clear, from the language of the will (quoted supra) that Ellen Mary Williams intended that, upon the death of all beneficiaries under the trust, that the residue of the trust fund should go, not to the State, but to any of her heirs living at the death of the surviving beneficiary. When the court found her only heirs to be her three children, this was all that was necessary to be then determined. There was no adjudication of the fact as to who would be "heirs" at the termination of the trust, for the reason that it was impossible to determine such fact upon distribution and

prior to the termination of the trust. Thus it appears that there can be no estoppel because there was no adjudication of the issue.

[2-4] It is next contended by appellant that respondents are likewise estopped by the decree settling the final account of the trustee (quoted supra), in which it is found that "there are no heirs at law of Ellen Mary Williams, deceased, and there was no such heir surviving at the time of the death of said John S. Williams, the surviving beneficiary under said trust". It will be noted that this decree was made in the face of the fact that at such times there were living a number of such heirs. No notice of the hearing of the petition upon which said decree was based was served upon these heirs—respondents herein—many of them living within the State of California. The only notice given was by posting for ten days —one copy was posted at the courthouse. The notice may have complied technically with the probate law, but under the circumstances, the failure or neglect to give these heirs personal notice is a course not to be commended. This is so, assuming that there may have been some legal question as to whether or not they were the sort of heirs who might succeed to the trust fund. We do not believe, however, that this finding to the effect that there were no heirs, precludes or estops respondents from setting up their right to the fund. At the most, the finding must be construed to the effect that there were no "known heirs". It merely means that the court could find no heirs. "It is, however, a presumption of law that every intestate has left someone on earth entitled to claim as his heir, however remote. Practically, therefore, omitting the variation mentioned above, it is meant that no lawful heirs can be found." 10 Cal.Jur., p. 567, § 1. The very purpose of the escheat statute is to permit heirs who were unknown at the time of distribution to subsequently establish their right to property distributed to the State for lack of "known heirs". Section 1272a of the Code of Civil Procedure, as amended by St.1939, p. 1456, as reasonably construed, gives these respondents the right to proceed as they have, where property has been distributed to the State after a finding in a decree that the decedent left no heirs, and the law carries the implication that the decree of distribution to the State necessarily found that there were no heirs; otherwise, how could such a distribution ever be made? The section reads in part as follows: "Any person entitled to succeed to the property or to take title thereto or possession thereof, and not a party or privy to any proceedings had under any of the foregoing sections of this title, may, unless otherwise barred, file a petition in the Superior Court of the county of Sacramento showing his claim or right to the property, or the proceeds, thereof, or to any portion thereof."

[5] This was the law under which the action was brought, and we hold that the decree distributing the trust fund does not bar the right of respondents. The fact that title has vested in the State under such a decree of distribution cannot bar these respondents. The section of the Code of Civil Procedure under which the action is brought —(section 1272a)—specifically gives them the right to recover, as it refers to "other property, real or personal, which is to be held for third persons, or the title to which has vested in the State subject to the rights of third persons".

[6] It is next contended by appellant that the superior court of Sacramento county has no jurisdiction to determine the matter of heirship. What we have said disposes of this issue. It is not a question of conflict of jurisdiction. This is a statutory proceeding, and the right to maintain it in Sacramento county is not affected in any manner by the prior proceedings in another county. The fact that a decree of distribution to the state under section 1272a of the Code of Civil Procedure, finds that there are no heirs, does not estop those who afterward claim to be heirs, from maintaining an action under said section to establish their right to property in the hands of the state.

[7] The intervention of the attorney-general in the proceedings to terminate the trust, does not assist the state in any manner, or add to the legal effect of the decree distributing the trust fund so as to create an estoppel. The only manner in which the attorney-general, on behalf of the state, can proceed to secure a judgment of escheat is under the provisions of section 1269 of the Code of Civil Procedure. The proceedings in intervention did not follow that section. The distribution of the trust fund to the State was therefore in no different category than any other distribution where no heirs are found, and parties entitled to succeed to the estate would have five years from the receipt of the money by the State in which

to commence proceedings under section 1272a of the Code of Civil Procedure.

[8] We find no other contentions which require further discussion. These respondents are admittedly heirs of Ellen Mary Williams. They come clearly within the purview of the law governing escheats. The State holds property distributed to it from the estate of Ellen Mary Williams, for the reason that there were no known heirs. They are therefore entitled to recover.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.




37 Cal.App.2d 353

**PEASE v. GIBSON.**

**Civ. 6211.**

District Court of Appeal, Third District, California.

Feb. 16, 1940.

**Adverse possession ⇐13**

Where husband deeded in 1925 to his second wife the whole of property in which his deceased wife had interest as tenant in common, and second wife and her grantee under deed recorded in 1929 and grantee's distributee were in possession and fenced and improved property and paid taxes thereon to 1935, distributee had good title, as against heir of deceased wife or administrator of her estate, by adverse possession under deed furnishing color of title.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action to quiet title by Edith Pease against Ernest L. Gibson, administrator of the estate of Rachel C. Gibson, deceased. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Rich & Weis and Carlin & Fuidge, all of Marysville, for appellant.

Hewitt & McBride, of Yuba City, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment rendered against the administrator of the estate of Rachel C. Gibson, deceased.

The action was one to quiet title, and the court found plaintiff to be the owner of the property in question, and made the further finding that defendant had no interest therein.

Appellant, who is the son of Rachel C. Gibson, deceased, takes the position that the property in question, to the extent of the interest of Rachel as tenant in common, is subject to administration even though respondent may have gained title thereto by adverse possession. No administration was had or sought of the estate of Rachel Gibson until 1935, at which time appellant was appointed administrator.

Rachel C. Gibson, the deceased, took an interest in this property as a tenant in common with her husband by way of a deed which was executed and recorded in 1892. Rachel died in 1916, and her husband, William Gibson, married Arvilla. In 1925 William Gibson conveyed the whole of this property by gift deed to Arvilla Gibson, his wife. This deed was recorded in July, 1925. Arvilla Gibson conveyed this property to Emily Huffmaster, the mother of respondent, by deed in 1928. This deed was recorded in May, 1929. Emily Huffmaster died in 1930, and this property was distributed to respondent and her brother, Earl Huffmaster in 1931. By deed dated and recorded September 5, 1931, Earl Huffmaster conveyed his interest in the property to respondent. Since the time of the grant by William Gibson to Arvilla, the latter and her grantee, Emily Huffmaster, and respondent herein, have been in possession of the property, have fenced and made improvements to it and paid all taxes thereon up to the year 1935.

We are of the opinion that the judgment in favor of respondent is proper and that appellant has no interest in the property in question, either as administrator of the estate of Rachel C. Gibson or as heir thereto. The findings are adequately supported by the evidence of good title by adverse possession in the respondent. Even though it were to be presumed that privity of estate, for the purpose of title by adverse possession did not exist as between Arvilla Gibson and the mother of respondent, nevertheless, the evidence shows that respondent's mother went into possession of the

property under deed and color of title in May, 1929. This deed was recorded the same day.

The possession of the property by respondent's mother under color of title, together with the possession thereof by respondent under color of title, is sufficient to satisfy the requirements of adverse possession and vest title in said respondent without considering the question as to whether possession under deed by Arvilla Gibson may be taken advantage of by respondent. The requirements as to taxes and improvements have been adequately fulfilled. There appears to have been sufficient elements present to have satisfied the requirements of title by adverse possession under claim of right, which requires a stronger showing than necessary under a deed furnishing color of title. In the latter situation, and the one under which respondent has gained title by adverse possession, the element of honest belief of title under a deed is present and consequently there is not the requirement of all of the acts called for as in the case where one takes over property claiming title thereto as a matter of right. There is no evidence of bad faith on the part of respondent or her mother. There is nothing to show that they questioned title in Arvilla Gibson, or her right to convey the same. This being true, it cannot be said that respondent has claimed title under the heirs of Rachel C. Gibson, but rather that title has been asserted in opposition to the heirs of the decedent. It cannot be claimed on the other hand that title by adverse possession has been acquired against the administrator, as respondent's title was complete before administration began.

In the case of Tynan v. Walker, 35 Cal. 634, 95 Am.Dec. 152, the administrator was appointed twelve years after the death of the decedent and brought an action in ejectment against the defendant who had been in possession for some twelve years, under claim of right to certain lands belonging to decedent. The court held that defendant's plea of the statute of limitations was well taken, and that the action was barred, regardless of the fact that no administrator had been appointed prior to that time. There appears to be no reason why respondent should not be placed in the same position as one who has gained title by adverse possession under claim of right.

The case of Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 823, 121 A.L.R. 1404, appears to be controlling as to the issues before us in this case. There the plaintiff went into possession of the property in question, and recorded his deed twelve years before the issuance of letters of administration upon the grantor's estate. The deed to plaintiff was defective as it failed to measure up to the legal requirements of delivery, but was sufficient to constitute a color of title. In passing upon the question as to whether plaintiff could gain title by adverse possession as against the other cotenants, the court said: "Although there are some decisions to the contrary, the weight of authority seems to support the doctrine that where a tenant in common enters into possession and claims under an invalid deed purporting to convey the property to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim, so as to start the statute of limitations running, at least where, as here, he knew nothing of the existence of the other cotenants."

In answer to the objection that even if plaintiff could and did hold adversely to his coheirs, he did not establish adverse possession against the estate, the court said in the Jones case, supra, 12 Cal.2d 618, 86 P.2d at page 825, 121 A.L.R. 1404: "He did not take the property during administration, or from the estate. His title by adverse possession, * * * was complete before administration began. The mere possibility of some future proceedings in administration could not completely bar the acquisition of an adverse title. It would seem clear that if adverse possession can be gained against the other heirs, who have the legal title, it certainly can be gained against *such claims* as the executor or administrator may have for *purposes* of administration." (Italics added.)

See Murdock v. Mitchell, 30 Ga. 74, 76 Am.Dec. 634.

We conclude that respondent is the owner of the real property, which was the subject-matter of the action to quiet title herein, and that no interest in said real property is subject to administration.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

37 Cal.App.2d 307

## PACIFIC STATES SAVINGS & LOAN CO. v. NORTH AMERICAN BOND & MORTGAGE CO.

Civ. 11325.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1940.

1. Mortgages ⇐309(1)

The trustor in a deed of trust and lender, or successors of such parties, may, by appropriate joint action, revoke the trust entirely, leaving the title to the property in the trustor or his successor free of any trust or incumbrance.

2. Mortgages ⇐274

The trustor in a deed of trust and the lender may, by appropriate joint action, convey title to a third person free of any trust or incumbrance.

3. Mortgages ⇐23

The trustor in a deed of trust and the lender may, by appropriate joint action, substitute a new trustee in place of the original trustee named in deed of trust.

4. Mortgages ⇐342

A "substitution of trustee" jointly executed and recorded by successor of trustor and successor of lender was valid and effectively revoked powers of original trustee and terminated any interest of original trustee in the property, so that purchaser at sale conducted by substituted trustee acquired title as against original trustee.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Pacific States Savings & Loan Company against the North American Bond & Mortgage Company to quiet title, wherein defendant cross-complained, asserting an interest as original trustee under a deed of trust. From judgment denying any relief to plaintiff and adjudging that title was vested in defendant, plaintiff appeals.

Reversed with directions.

John L. Mace, of Los Angeles, for appellant.

Alvin W. Wendt, of Hollywood, for respondent.

SPENCE, Justice.

Plaintiff purchased certain real property at a sale conducted by Pacific Auxiliary Corporation as the substituted trustee under a deed of trust. It brought this action to quiet title against the defendant corporation, which was the original trustee under said deed of trust. The claim of the defendant was based solely upon its alleged interest as such trustee. The trial court entered judgment denying any relief to plaintiff and adjudging that title to said real property was vested in defendant as such trustee. Plaintiff appeals from said judgment.

The cause was tried upon stipulated facts. The plaintiff corporation and Olga Rupp were respectively the successor in interest of the original lender and the successor in interest of the original trustor. Said deed of trust did not contain the provision frequently found in such deeds of trust permitting the lender alone to substitute a new trustee. After the enactment in 1935 of section 2934a of the Civil Code, plaintiff and said Olga Rupp jointly executed and recorded a document entitled "Substitution of Trustee", and complied with all the requirements of that section for the purpose of substituting Pacific States Auxiliary Corporation as trustee under said deed of trust. Said substituted trustee conducted the sale thereunder and plaintiff became the purchaser. Thereafter said substituted trustee executed and delivered to plaintiff a trustee's deed to the property.

The sole question presented is that of the validity of said substitution. It will be noted that the above-mentioned "Substitution of Trustee" was not executed solely by the successor of the lender but was executed by both the successor of the trustor and the successor of the lender. It will be further noted that the original trustee is the only one challenging the validity of said substitution.

The trial court stated in its findings of fact and conclusions of law that it found said substitution invalid first, because said section 2934a applied only to deeds of trust "conferring no other duties upon the trustee than those which are incidental to the * * * power of sale therein conferred", whereas the deed of trust here "conferred another duty, to-wit: the duty of reconveying the property when the note was paid"; and second, because said sec-

tion became effective after the execution of said deed of trust and was intended only to affect deeds of trust subsequently executed; and third, because if given retroactive effect, it "would amount to an interference with the right of contract and the taking of property without due process of law".

Plaintiff contends that the trial court erred in declaring said substitution invalid and in entering judgment in favor of defendant. In our opinion this contention must be sustained.

Plaintiff's claim that the substitution was valid is based upon two grounds. The first ground is that said section 2934a is applicable to all deeds of trust similar to the one under consideration regardless of the time of execution of said deeds of trust and that the application thereof to deeds of trust previously executed violates no constitutional rights. The second ground is that the substitution was made here by the joint action of the successor of the trustor and the successor of the lender and that it was not dependent upon said section 2934a for its validity. We are of the opinion that we may base our conclusion that the substitution was valid upon the second ground above stated and that it is therefore unnecessary to discuss the first ground.

The nature of the instruments called deeds of trust and the legal consequences of the execution of such instruments have been frequently discussed and the authorities were extensively reviewed in Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940. It has been said that such deeds of trust are "an anomaly in our system" and that "in effect they are mortgages with power to sell". Hodgkins v. Wright, 127 Cal. 688, 692, 60 P. 431, 432. It further appears that the status of a trustee under such a deed of trust is an anomalous one. While such a deed of trust takes the form of a grant of title to the trustee, it is not always treated as a "grant" but it is frequently treated as a mere "encumbrance". Burns v. Peters, 5 Cal.2d 619, 55 P.2d 1182. Such a deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt". MacLeod v. Moran, 153 Cal. 97, 99, 94 P. 604, 605. Neither delivery to the trustee nor the consent of the trustee is essential to the validity of such a deed of trust (Burns v. Peters, supra; Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am.St.Rep. 92; Huntoon v. Southern T. & C. Bank, 107 Cal.App. 121, 290 P. 86), and doubt has been cast upon whether the trustee is a trustee in the strict sense of the word or is merely an agent appointed by the parties to exercise the limited powers conferred upon him as such agent. In Ainsa v. Mercantile Trust Co., 174 Cal. 504, at page 510, 163 P. 898, at page 900, the court said, "A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey. * * * A trustee under an ordinary deed of trust is the common agent of both parties and is required to act impartially. * * * Some authorities hold that he is not a trustee at all in a technical sense." With respect to foreclosure, it has been held that no constitutional right of the parties is violated by the application of a statute, subsequently enacted, giving to the lender the additional remedy of a judicial foreclosure (Lincoln v. Superior Court, 2 Cal.2d 127, 39 P.2d 405) and that the trustee "has no right to complain if the beneficiary takes advantage of a statute allowing a judicial foreclosure of the deed of trust". Field v. Acres, 9 Cal.2d 110, 113, 69 P.2d 422, 424.

[1-4] While the courts of this state may be said to have adhered quite generally to the so-called "title" theory rather than to the so-called "lien" theory with respect to deeds of trust (see Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, supra), it has never been held that the powers granted to the trustee may not be revoked or that the interest, if any, of the trustee in the property may not be terminated by the joint action of the trustor and the lender. If we regard substance rather than form, it would seem that the anomalous role of the so-called trustee under a deed of trust is more nearly the role of a "common agent of both parties" and not that of a "trustee at all in a technical sense". If he be treated as a mere agent, his powers are clearly revocable under familiar rules of agency (Civ.Code, sec. 2356), but whether he be treated as a mere agent or as a trustee with the limited powers conferred by the deed of trust, we are of the opinion that he possesses no powers and no interest which are beyond the reach of the parties creating the same, or of the successors in interest of such parties. In other words, we are of

the view that the principal parties to the transaction, to-wit, the trustor and the lender, or the successors of said parties, may by appropriate joint action revoke the trust entirely leaving the title to the property in the trustor or his successor free of any trust or encumbrance; that they may by appropriate joint action convey title to a third person free of any trust or encumbrance; and that they may by appropriate joint action substitute a new trustee in the place of the original trustee named in the deed of trust. This view merely accords to said principal parties the same measure of control over the transaction as have the principal parties under a mortgage containing a power of sale. There seems to be no sound reason, as between the principal parties and the trustee, to deny to the principal parties that same measure of control. We conclude that the substitution jointly executed and recorded by the successor of the trustor and the successor of the lender was valid and that it effectively revoked the powers of the defendant trustee and terminated any interest of the defendant trustee in the property. It follows that judgment should have been entered in favor of the plaintiff upon the stipulated facts.

The judgment is reversed with directions to the trial court to enter judgment in favor of the plaintiff.

We concur: NOURSE, P. J.; STURTEVANT, J.




37 Cal.App.2d 315

**GRAHAM-LOFTUS OIL CORPORATION v. MOUNTAIN VIEW DEVELOPMENT CORPORATION et al. (BRAIN et al., Interveners).**

Civ. 2293.

District Court of Appeal, Fourth District, California.

Feb. 15, 1940.

**1. Contracts** ⇐300(1), 309(1)

Inability to perform does not excuse nonperformance of contract if thing to be done is not inherently impossible of performance, and one who makes a promise which cannot be performed without co-operation of a third person cannot excuse nonperformance because of inability to secure required co-operation, but nonperformance is excused if inability to perform is merely temporary and does not affect essence of the contract, particularly where it causes no damage to the other party.

**2. Sales** ⇐476

Under contract for conditional sale of oil well drilling outfit for cash in installments plus 5 per cent. royalty, where seller itself requested buyers to obtain consent of landowners to assignment of royalty interest, seller could not thereafter complain that such consent was unnecessary.

**3. Sales** ⇐479(7)

In action by seller to recover oil well drilling equipment which had been sold under conditional sales contract for cash in installments plus 5 per cent. royalty, wherein seller alleged breach of contract by buyers, evidence established that inability on part of buyers to assign royalty was only temporary, that it did not affect essence of conditional sales contract, and that delay was harmless.

**4. Sales** ⇐476

Under contract for conditional sale of oil well drilling outfit for cash in installments plus 5 per cent. royalty with provision for delivery of bill of sale upon completion of cash payments and delivery of an instrument evidencing seller's royalty interest, where buyers completed cash payments and obtained permit from Corporation Commissioner to assign 5 per cent. royalty to seller, and deposited assignment with escrow holder approved by Corporation Commissioner in accordance with requirements of permit, such delivery was equivalent to a delivery directly to seller, precluding recovery of equipment by seller on ground that buyers had failed to deliver assignment.

**5. Sales** ⇐476

Under contract for conditional sale of oil well drilling outfit for cash in installments plus 5 per cent. royalty, where seller informed buyer that permit from Corporation Commissioner was required before assignment of royalty could be made, seller was bound by conditions imposed in permit by Corporation Commissioner, requiring that assignment be held in escrow until further order of the commissioner.

**6. Sales** ⇐476

Under contract for conditional sale of oil well drilling outfit for cash in install-

ments plus 5 per cent. royalty, where evidence indicated that individuals who signed conditional sales contract signed merely as guarantors of corporation for payment of cash purchase price, and corporation was sole owner of lease covering property on which well was being drilled, signatures of individual buyers to royalty assignment were unnecessary, and seller could not complain of their absence as basis for recovering the equipment on ground of breach by buyers.

**7. Sales ⇐476**

Under contract for conditional sale of oil well drilling outfit for cash in installments plus 5 per cent. royalty, where temporary inability to deliver royalty assignment was not of unreasonable duration, no damage resulted, seller received full cash purchase price, and royalty assignment was executed and delivered in accordance with permit issued by Corporation Commissioner, trial court was justified in refusing to permit a forfeiture and in requiring seller to proceed with performance.

**8. Chattel mortgages ⇐157(2)**
**Estoppel ⇐118**

In action by seller to recover oil well drilling equipment which had been sold under a conditional sales contract, wherein the holders of a chattel mortgage subsequently executed by buyer intervened, evidence that general manager who handled transaction for seller informed predecessor in interest of interveners that equipment was paid for, and that it would be satisfactory for predecessors to take the mortgage, sustained finding that seller consented to execution of chattel mortgage and warranted conclusion that seller was estopped from claiming any interest in the equipment as against interveners.

---

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by the Graham-Loftus Oil Corporation against the Mountain View Development Corporation, and others to recover certain oil well drilling equipment, wherein A. Brain and another intervened. From a judgment adjudging defendants to be entitled to a bill of sale for the equipment, and adjudging that interveners were entitled to foreclose chattel mortgage subsequently executed thereon by the named defendant, plaintiff appeals.

Affirmed.

George E. Farrand and Edward W. Tuttle, both of Los Angeles, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

Merritt D. Jergins and Simon Miller, both of Long Beach, for interveners.

THOMSON, Justice pro tem.

This is an appeal by plaintiff from a judgment of the court, sitting without a jury in a claim and delivery suit to recover oil well drilling equipment, adjudging that defendants are entitled to a bill of sale from plaintiff for said drilling equipment theretofore purchased under a conditional sales contract; and that interveners may foreclose and sell said equipment under a subsequent chattel mortgage executed by defendant corporation.

Under date of January 10, 1934, certain individuals entered into an oil and gas lease, as lessors, with Walter M. Crawford, as lessee, covering 80 acres of land in Kern county. The lessee's interest was subsequently assigned to the defendant corporation. The lease stipulated that other than one assignment of the entire interest of lessee to a California corporation, assignments might be made only upon the written consent of lessors first had and obtained. On May 12, 1934, plaintiff, as seller, entered into a contract with defendants, excepting defendant Fishfader, as buyers, whereby said defendants agreed to purchase from plaintiff a rotary oil well drilling outfit. The agreement contained the following clause: "Price: The cash purchase price for said equipment shall be Ten Thousand Dollars ($10,000.00) * *" Then follow clauses providing for the pavement of monthly installments of $1,000 each. The agreement also provides that "in addition to the cash price above mentioned and as further consideration for said equipment, the buyers agree to deliver to seller five per cent (5%) of the gross amount of all oil and gas which may hereafter be produced by buyers, their successors or assigns" on said land "on which Mountain View Development Company now holds a lease". As a further consideration the defendants agreed to abandon plaintiff's "Well No. 1" in Fresno County, where the drilling equipment was located, in compliance with law and the rules of competent public authority. The buyers also agreed that "until the said cash purchase price shall have been paid buyers shall use and maintain said equip-

ment in a careful and workmanlike manner. * * *" A default clause provided that "in event of any default on the part of buyers in the payment of any installment of the cash purchase price * * * or in the observance or performance of any condition or covenant on their part hereunder * * *" plaintiff might declare the whole amount of the unpaid cash purchase price due and payable and might take such action to collect the same as it might elect, or it might repossess the property. Title to the equipment was reserved in the seller until the full purchase price was paid. The seller agreed to execute and deliver to the buyers a bill of sale to the equipment "when buyers shall have paid the full cash purchase price and are not then in any default in the observance or performance of any other covenants or conditions * * *"; and it was agreed that "at such time buyers shall execute, acknowledge and deliver to seller" an "instrument in form satisfactory to seller as the latter shall designate, evidencing seller's right to receive five per cent (5%) of all oil and gas thereafter produced by buyers * * *" on said premises. There is evidence to the effect that the individual defendants do not claim any interest in the personal property or leasehold, but were guarantors of defendant corporation. The defendant corporation abandoned the well above mentioned at a cost of about $1,500 and removed the equipment to said leased premises, where it drilled a well. It paid plaintiff all installments of the cash purchase price and, upon payment of the last installment, requested a bill of sale of said equipment, but plaintiff refused to execute such bill of sale on the ground that defendant corporation was not entitled to a bill of sale until it had executed an assignment of five per cent of such oil and gas. At that time defendants were unable to execute such an assignment because some of the lessors declined to sign a consent to such assignment until the well was completed. However such consent was later secured and defendants also obtained a permit from the Corporation Commissioner to make such assignment, and on February 9, 1939, while this case was pending, defendant corporation deposited such an assignment with an escrow holder approved by the Corporation Commissioner, in accordance with the requirements of such permit, and filed a supplemental answer setting forth those facts. On February 17, 1935, Oil Well Supply Company, a corporation, assignor of the interveners, took a note and chattel mortgage on said equipment for $6,500, which the interveners assert was executed and accepted with the consent of plaintiff, and they seek to foreclose said chattel mortgage and sell said equipment. The trial court rendered judgment that plaintiff take nothing by its complaint and directing plaintiff to execute a bill of sale of said equipment to defendant corporation and directing the foreclosure of the chattel mortgage and the sale of the mortgaged property.

Appellant presents numerous points in its briefs, but they may be fairly summarized in two main issues. As between plaintiff and defendants the principal issue is whether or not the defendants, as buyers, complied with the requirements of the conditional sales contract so as to be entitled to a bill of sale from plaintiff; and as between plaintiff and the interveners the principal issue is whether or not a chattel mortgage taken from defendants by the assignor of the interveners, with knowledge of said conditional sales agreement, was valid by reason of an alleged estoppel claimed by the interveners.

[1-3] Appellant urges that the trial court's conclusion and judgment that defendant corporation is entitled to possession of, and to the bill of sale to, the drilling equipment, is contrary to the findings of fact and the evidence, in that defendants breached the conditional sales contract because they failed to execute and deliver to plaintiff an instrument, as required by said contract, evidencing plaintiff's right to receive 5 per cent of the gas and oil produced on the leased premises.

We think the evidence shows that defendants have not failed or refused to execute and deliver to plaintiff an instrument evidencing appellant's right to receive said percentage of oil and gas provided for in the conditional sales agreement. On March 6th, 1935, plaintiff, through its attorneys, wrote to defendants, stating, among other things, that it would be necessary for the defendant corporation to obtain a permit from the Corporation Commissioner authorizing said defendant to execute and deliver to plaintiff the assignment of royalty provided for in the conditional sales contract. Plaintiff also prepared and delivered to defendants a form of application for such permit. After defendant corporation received said

permit it executed such an assignment and deposited it with an escrow holder approved by the Corporation Commissioner, in accordance with a requirement of said permit. It is true that, at the time the last installment of the cash purchase price was paid, when defendants requested a bill of sale, they were not in a position to make an assignment of any royalty interest, because it required the consent of the lessors above mentioned, and some of them declined to give such consent until the well was completed. Appellant cites many authorities which support the well-established principles of law that inability to perform does not excuse non-performance if the thing to be done was not inherently impossible of performance, and that, one who makes a promise which cannot be performed without the consent or cooperation of a third person, cannot excuse his nonperformance because of his inability to secure the required consent or cooperation of such person. We think, however, a distinction exists where the inability to perform is merely temporary and does not affect the essence of the contract; (United States Trading Corp. v. Newmark Grain Co., 56 Cal.App. 176, 186, 205 P. 29) and particularly where it causes no damage to the other party, as appears in the instant case. That the 5 per cent royalty was regarded as highly speculative and not considered by appellant as the essence of the conditional sales agreement is indicated by the fact that the contract provided for a "cash purchase price" of $10,000 and stipulated that, until the "cash purchase price" had been paid, the buyers were obligated to keep the equipment in good condition and repair. There was no requirement to keep the equipment which appellant agreed to sell to respondent in good condition until the 5 per cent royalty had been assigned to appellant, or until any of the terms or conditions of the contract were performed except the payment of the "cash purchase price". The record also discloses the fact that plaintiff, through its agents was familiar with the terms of the lease above referred to, having been given a copy thereof for reference in preparing the conditional sales contract. One of the terms of the lease prohibited assignments of any interest by the lessee without the consent of the lessors first had and obtained. Appellant argues that, regardless of the clause in the lease prohibiting assignments without the written consent of the lessors, the defendants should have executed and delivered the instrument evidencing the right of appellant to 5 per cent of such oil and gas, because it would not constitute an assignment of any interest in the lease. But the evidence shows that appellant itself requested defendants to obtain such consent of the landowners, as disclosed by the form of consent of said lessors appended to the application for a permit of the Corporation Commissioner prepared by plaintiff and mentioned above. Appellant cannot now complain that such consent was not necessary. When plaintiff offered, by a letter dated March 6, 1935, to give defendants a bill of sale on condition that defendants execute and deliver the royalty assignment, defendants endeavored to obtain the consent of the lessors, but some of them at that time declined to join in such consent. These endeavors on the part of defendants were continued until such consent was obtained in 1939, whereupon defendants took immediate steps to obtain the permit of the Corporation Commissioner, and having received it, promptly executed the royalty assignment and deposited it in escrow as required by said permit. There is evidence to the effect that oil was never produced in commercial quantities from the well on said leased premises and that the small production obtained was not sufficient to furnish necessary fuel for defendants' operations in endeavoring to bring in the well. The lease exempted from royalty payments "so much of the water, oil and/or gas produced on said property as may be required in the operation of the property". Appellant having received a copy of the lease, knew of this provision, and knew that necessary fuel oil and gas would be exempted from the payment of any royalty. It is also a significant fact, as indicative of appellant's interpretation of the royalty clause of the conditional sales contract, that, in the form of assignment of the 5 per cent royalty appended to the form of application for a permit of the Corporation Commissioner, prepared by plaintiff and delivered by plaintiff to defendants, such royalty was confined to 5 per cent of the oil and gas produced under the terms of said lease. It is apparent, then, that the inability to perform on the part of defendants was only temporary; that it did not affect the essence of the conditional sales contract; and, while the delay was for a considerable period of time, still it occurred during an interim

when the delay was harmless, as no production of oil or gas was obtained from which to pay any royalty.

[4] Appellant next attacks the finding to the effect that defendant delivered or caused to be delivered to plaintiff an assignment satisfactory in form to plaintiff, evidencing plaintiff's right to receive 5 per cent royalty. In this connection appellant complains that the instrument was not delivered to appellant and that the evidence did not show that the instrument was in form satisfactory to appellant. However, the Corporation Commissioner's permit required it to be delivered to an escrow holder until the further order of the commissioner. In accordance therewith the instrument was executed and placed in escrow with an escrow holder approved by said commissioner, and the escrow holder recorded the instrument and delivered a copy thereof to appellant. Such delivery, we think, under the circumstances of this case, is equivalent to a delivery directly to appellant.

[5] It is important also to note that, in plaintiff's letter to defendants dated March 6, 1935, plaintiff informed defendants that it was necessary to obtain a permit from the Corporation Commissioner to execute and deliver said assignment of 5 per cent royalty. Appellant, therefore, is bound by the terms and conditions imposed by the Corporation Commissioner in his permit, one of which is that the assignment be held in escrow until the further order of the commissioner. Appellant cannot now be heard to complain because defendants have obtained such permit and have executed and delivered the royalty assignment as required in said permit. The form of assignment is in accordance with the terms of the conditional sales contract and, in a letter from defendant corporation to plaintiff dated February 18, 1939, enclosing a copy of the assignment, defendant corporation agrees to comply with the conditional sales contract relative to the manner of delivering or paying for said royalty. Plaintiff could have no reasonable objection to the form of assignment of the 5 per cent royalty. Moreover, no objection was offered at the trial to the form of assignment.

[6] Appellant further attacks the assignment on the ground that the individuals who signed the conditional sales contract as buyers did not join in the assignment. There is evidence which indicates that these individuals signed the conditional sales contract merely as guarantors of the defendant corporation for the payment of the cash purchase price. It should be noted also that the defendant corporation was the sole owner of the lease, and the form of assignment appended to said application for said permit prepared by plaintiff confined the 5 per cent royalty to oil and gas produced under said lease on the land therein leased, and designated that the assignment was to be executed by the corporation defendant alone. Under these circumstances the signatures of the individual defendants were unnecessary and appellant may not complain of their absence.

[7] Under the circumstances disclosed by the evidence we think that defendants did not breach the conditional sales contract by failing to deliver to plaintiff any oil or gas; that the temporary inability of defendants to execute and deliver a proper assignment of said 5 per cent royalty was not of unreasonable duration; that no damage to plaintiff resulted from such delay; and that there was a substantial compliance by defendants with the terms of said conditional sales contract. Appellant has received the full amount of the cash purchase price, the Fresno county well has been lawfully abandoned, and the instrument assigning a 5 per cent royalty has been executed and delivered in accordance with the permit issued by the Corporation Commissioner. We, therefore, believe the trial court was justified in refusing to permit a forfeiture and in requiring the appellant to proceed with the performance of said contract. 12 Am. Juris. p. 963, sec. 387.

[8] Appellant's final contention is that the evidence does not support the finding that plaintiff, by and through its agents duly authorized so to do, informed Oil Well Supply Company (interveners' predecessor) that the drilling equipment was paid for and was owned by the defendant corporation and that plaintiff consented to the execution of a chattel mortgage thereon. As a conclusion of law the trial court found that plaintiff is estopped from claiming any interest in or any right of possession to the drilling equipment as against both defendants and interveners. The finding of fact and conclusion of law above referred to are made the basis of the judgment of foreclosure of the chattel mortgage held by the interveners.

The complaint in intervention sets up a chattel mortgage for $6,500 dated February 17, 1935 (subsequent to the execution of said conditional sales contract), executed by the defendant corporation to Oil Well Supply Company and assigned to the interveners, who claim an estoppel as against the plaintiff. In support of their theory of estoppel the interveners introduced the testimony of W. A. MacMullen, who testified, in substance, that he was employed in the credit department of Oil Well Supply Company; that on February 17, 1935, he was called to Bakersfield in connection with the proposed chattel mortgage and, before consummating the transaction, he telephoned to Hugh B. Martin (general manager of plaintiff) with whose voice he was familiar, and told Mr. Martin that his (MacMullen's) company contemplated taking a chattel mortgage on said drilling equipment which he understood defendant corporation had purchased from plaintiff, and he wanted to know if the equipment was clear. In this connection he testified as follows: "He told me that the material was paid for but that there was a matter of either a per cent or interest which was being adjusted at that time and it would be satisfactory for us to take the mortgage". Martin denied that he made such a statement, but this merely raises a conflict in the evidence and the trial court has accepted MacMullen's version of the conversation. The significance of the testimony of the witness MacMullen cannot be fairly appraised without first considering the evidence in regard to Martin's connection with the whole transaction. He was the general manager of plaintiff. The negotiations for the purchase of the equipment were with him. He specified the price and the terms and the deal was consummated by him. He accepted the final cash payment and conferred with the buyers concerning their bill of sale and, so far as the evidence discloses, was the agent of the plaintiff corporation with whom defendants had dealt throughout the entire transaction, except that the contract was signed by the president and secretary of plaintiff corporation. When MacMullen talked with Martin the full cash purchase price for the equipment had been paid, the Fresno county well had been properly abandoned and drilling on the leased premises was still in progress. Defendant corporation needed casing to complete the well and had arranged to purchase it from the Oil Well Supply Company. The payment for the pipe, together with an open account, was to be secured by a chattel mortgage on all equipment. Of course, it was to plaintiff's best interests to have defendant corporation complete the well and start paying plaintiff the 5 per cent royalty if oil or gas should be found. MacMullen had caused the pipe to be stopped in transit and then talked to Martin before allowing delivery to defendant corporation. Under such a state of facts, a waiver such as the interveners claim plaintiff made was not incredible, but was plausible enough to cause a reasonable man in MacMullen's circumstances to act upon Martin's assurance that the equipment was paid for and that it was satisfactory to plaintiff for the Oil Well Supply Company to take the chattel mortgage on the equipment.

Appellant advances the contention that Martin's waiver was not within the scope of his authority as general manager of plaintiff and that such a waiver could not be given without express authority from plaintiff's board of directors, and appellant cites numerous cases in support of his position, most of which involve the right of corporate agents to execute or modify contracts entered into directly with the other contracting parties. Here we are not dealing with the question of an agent's power to execute or release a chattel mortgage without express authority from the board of directors, but rather with the question of whether or not a corporation can be estopped to assert a claim of title to or right of possession of personal property by reason of representations made by its general manager to a third party and relied upon by such third party. In the instant case Martin was the general manager of plaintiff corporation. He was the agent who handled this particular transaction from its inception and MacMullen had a right to infer that Martin had authority to bind plaintiff corporation in the transaction involved. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 452, 181 P. 658; Ray v. Borgfeldt, 169 Cal. 253, 265, 146 P. 679; Western Lith. Co. v. Vanomar Producers, 185 Cal. 366, 368, 197 P. 103; Stevens v. Selma Fruit Co., Inc., 18 Cal.App. 242, 250, 123 P. 212. Martin might have refused to respond to MacMullen's inquiry, but having undertaken to give him information, knowing as he did that MacMullen intended to act upon it, his company is bound by his

representation. Seaman v. Big Horn Canal Ass'n, 29 Wyo. 391, 213 P. 938, 940.

It follows that plaintiff, having thus led the Oil Well Supply Company to believe that the pipe was paid for and that it was satisfactory to plaintiff for the Oil Well Supply Company to take said chattel mortgage, and having thus induced said company to deliver the pipe to and accept the chattel mortgage from defendant corporation, plaintiff is estopped to claim the drilling equipment as against the interveners. Burgess v. Cal. Mut. Bldg. & Loan Assn., 210 Cal. 180, 187, 290 P. 1029; Dool v. First National Bank of Calexico, 209 Cal. 717, 724, 290 P. 15; Carpy v. Dowdell, 115 Cal. 677, 682.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 290

**PEOPLE v. RODRIGUEZ et al.**

**Cr. 3272.**

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1940.

**1. Conspiracy ⇐27**

An overt act in furtherance of conspiracy completes the offense, but such overt act need not be the objective offense contemplated by the conspiracy.

**2. Conspiracy ⇐47**

Less evidence will not suffice to overcome effect of doctrine of reasonable doubt where offense charged is conspiracy, than that which is considered necessary where other offenses are charged.

**3. Conspiracy ⇐47**

The same rules of evidence apply generally in conspiracy prosecutions, as in prosecutions for other criminal offenses.

**4. Criminal law ⇐1159(3)**

Although an appellate tribunal is bound by conclusions reached by trier of facts where evidence is reasonably susceptible of two inferences, nevertheless, where reason of such rule ceases, so should the rule itself. Civ.Code, § 3510.

**5. Conspiracy ⇐47**

Evidence that defendant furnished to alleged co-defendants a revolver, an automatic pistol and an automobile, which were concededly used by alleged co-defendants in committing robberies, was insufficient to support conviction of conspiracy to commit robbery.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Ignacio Rodriguez, Louis Panner and Ted E. Reed were charged with conspiracy to commit robbery, and from a judgment of conviction, Louis Panner alone appeals.

Reversed.

Waldo & Waldo, of Pasadena, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant, Louis Panner, appeals from a judgment of conviction, and from the order denying a motion for a new trial. It is contended by appellant that the evidence is insufficient and that the testimony of the alleged accomplice lacks corroboration.

The defendants, including appellant Louis Panner, were charged in an information filed by the district attorney, with the crime of conspiracy to commit robbery. As overt acts in furtherance of the conspiracy it is alleged that upon three different occasions, namely on January 26, February 11 and February 19, 1939, appellant furnished and gave to his alleged codefendants a revolver, an automatic pistol, and a Ford automobile, and it is alleged, further, as overt acts in furtherance of said conspiracy that upon three occasions, namely on January 27, February 12 and February 20, 1939, appellant's alleged codefendants committed the crimes of robbery.

A jury having been duly waived, the cause was submitted to the court upon the transcript of the evidence received at the preliminary hearing, supplemented by the testimony of additional witnesses.

It is conceded that the robberies were committed by appellant's alleged codefendants; it is also conceded that appellant's Ford automobile and a revolver belonging

to appellant's father, and also an automatic pistol belonging to a friend of appellant, were used in the robberies. It is also conceded that appellant was not present and did not participate in any of the alleged robberies. Appellant was at no time accused, by information or otherwise, of the offense of robbery.

The robberies were committed in the city of Los Angeles. Appellant resides in Yucaipa, which is about seventy-five miles from Los Angeles, where he owns and maintains a peach orchard which he has operated since the year 1930. His brother, and apparently his mother and father, reside on the adjoining property. The record also shows that from time to time appellant worked for Beggs Brothers, commission merchants in Los Angeles. As appellant testified, he had been employed by the Beggs Brothers "between the time of taking care of the ranch", and he had sold his crops to the Beggs Brothers, or through them, all of the time that he had had the orchard.

Appellant had lent his Ford automobile shortly before the alleged robberies to one Harry Roper, who was originally charged with robbery together with appellant's alleged codefendants; Roper was thereafter discharged on a writ of habeas corpus. Appellant had also lent his car to one Maurice Stevenson, whom, according to his testimony, he had met in November or December of 1938, at the market, where Stevenson helped unload trucks. The acquaintanceship was apparently a very casual one. Some time around the 23d of January, 1939, Stevenson came to Yucaipa, and there saw appellant, in connection with which visit appellant testified as follows: "He (Stevenson) said there was a place down here on a construction job, he came up the valley and wanted to go down and try getting a job there. I told him I couldn't go at the time, I was pruning my orchard but he could take the car and to have it back inside of a week, as we were figuring on a road job up in Mill Creek Canyon and I needed the car then." "Q. What do you mean by a road job? A. We took a contract building a road up in Mill Creek Canyon * * * for a private party." Stevenson, one of the alleged codefendants, has not been apprehended.

It appears from the record that shortly before the car was lent to Stevenson, appellant and a neighbor of his at Yucaipa had been shooting at targets with their pistols, and the neighbor, Harry Miller, a rancher, and a resident of Yucaipa for twenty-seven years, had left the automatic pistol in appellant's car. Appellant. who testified at length, asserted that at the time he lent the automobile to the above-named individuals, he did not know that Miller's automatic pistol had been left in the car, and had also forgotten that his own revolver was there.

Although appellant was in Los Angeles at the time the robberies were committed, his testimony in substance was to the effect that he had come to Los Angeles merely for pastime, and had had no knowledge whatsoever of any contemplated robberies.

Aside from the foregoing, and details incidental thereto, there is no evidence in the record tending to establish appellant's connection with the alleged robberies or the alleged conspiracy, except the following: Appellant's alleged codefendant, Murel Carroll, who admitted participating in two of the robberies, testified that appellant made the remark in Yucaipa that he (appellant) "could bring his car and guns to Los Angeles and give them to two guys here who would take them and bring him in money". The witness was unable to account for the remark on any reasonable basis. Carroll testified, further, that, "The reason I am testifying now is because I figure that Lou Panner is trying to get me behind the bars". In explanation of this testimony the witness Carroll further testified, "Well, I meant that this Lou" (referring to appellant) "thought he would get rid of me. He likes Pauline pretty well himself". Thus it appears that a treacherous influence threatened Carroll's veracity.

[1] Referring again to the pleadings, in addition to the overt acts above mentioned, namely, the furnishing by appellant of the automobile and the revolvers, it is alleged that in furtherance of the conspiracy, as other overt acts, certain defendants, excluding appellant, committed three robberies. Thus it is alleged and was proven at the trial that the objective offenses, namely robbery, contemplated by the conspiracy and for which purpose the defendants conspired, were in fact committed. It is true as a matter of law that the crime of conspiracy can be complete without the commission of the objective offense; in other words, an overt act in furtherance of the conspiracy completes the

offense, but such overt act need not be the objective offense contemplated by the conspiracy.

It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally. Thus, in the case at bar, no advantage accrues to the plaintiff by accusing the defendants, and appellant, of conspiracy instead of the objective offenses alleged, namely, robbery. In the circumstances here presented, if the evidence is insufficient to sustain the judgment of conviction of robbery, it is insufficient to sustain the judgment of conviction of the offense of conspiracy to commit robbery.

At the conclusion of the trial, the judge presiding made the following observation: "I always approach a conspiracy case with a searching attitude of mind, because of the very nature of the charge and the presumptive rules of evidence—much testimony is considered which would not be considered in a charge of an isolated offense." And, upon disposing of the motion for a new trial, the following additional remark was made by the court: "I merely state that as a human situation with which I realize you are confronted, and I can only say in that connection that like all conspiracy cases the testimony may be not as fulsome and complete as is the case in any other offense but conspiracy."

Thus the trial judge clearly regarded the offense of conspiracy as different from other offenses. It does not appear just why a consideration of the evidence in a conspiracy action should be approached with a "searching attitude of mind, because of the very nature of the charge", any more than in any other offense, nor does it appear what presumptive rules of evidence the trial judge had in mind; nor does it appear what testimony the court was under the belief could be considered in connection with the offense of conspiracy that could not be considered in the offense of robbery; nor does it appear why the testimony in a conspiracy action need not be "as fulsome and complete as is the case in any other offense but conspiracy". Had the cause been tried before a jury, and the jury instructed along the lines suggested by the remarks above quoted, such instructions clearly would have been reversible error. The guilt of the defendant was determined, nevertheless, by one with a viewpoint as to the law as above represented.

[2, 3] Relatively the same quantity and quality of evidence is required to overcome the effect of the doctrine of reasonable doubt where conspiracy is charged, as is required in any other offense; or, conversely stated, less evidence will not suffice to overcome the effect of the doctrine of reasonable doubt where the offense charged is conspiracy, than that which is considered necessary where other offenses are charged.

[4, 5] From a review of the record, the evidence falls far short of being sufficient to support the judgment as a matter of law. Conceding that an appellate tribunal is bound by the conclusions reached by the trier of facts where evidence is reasonably susceptible of two inferences, nevertheless, where the reason of a rule ceases, so should the rule itself (sec. 3510, Civ.Code); there is no reason for applying the above rule in connection with the disposition of the within appeal. The evidence relied upon by plaintiff to connect appellant with the alleged conspiracy is insufficient. The question is not whether the evidence of the co-conspirators is sufficiently corroborated, but whether there is sufficient evidence as a matter of law to connect appellant with the alleged conspiracy in the first instance.

For the foregoing reasons the judgment and the order denying the motion for a new trial, are, and each of them is, reversed.

We concur: YORK, P. J.; WHITE, J.

37 Cal.App.2d 275

## PEOPLE v. RICHARDSON, Superintendent of Banks.

Civ. 11326.

District Court of Appeal, First District, Division 2, California.

Feb. 14, 1940.

Hearing Denied April 11, 1940.

**1. Taxation ⇐124½**

Evidence that bank engaged in several normal banking activities while under conservator *held* to authorize finding that bank was "doing business," so as to be liable for franchise tax for such period. Gen.Laws 1937, Act 652, §§ 135b et seq., 135c; Act 8488, § 2.

[Ed. Note.—For other definitions of "Doing Business," see Words & Phrases.]

**2. Taxation ⇐124½**

A bank may be "doing business," so as to be subject to franchise tax, even after conservator has been appointed, as against contention that there is no difference in relationship or situation between a conservator and a liquidator. Gen.Laws 1937, Act 652, § 135b et seq.; Act 8488, § 2.

**3. Banks and banking ⇐63½**

The banking legislation providing for appointment of conservators manifests intent that conservator may be appointed when Superintendent of Banks deems that affairs are in such condition that, through temporary administrative control, its assets may be conserved and its affairs put in order so that it may continue business without complete liquidation. Gen.Laws 1937, Act 652, §§ 135b et seq., 136 et seq.

**4. Taxation ⇐528**

A bank from whom conservator had been appointed was properly charged with interest on unpaid franchise tax, notwithstanding that bank's affairs were in the custody of the law. Gen.Laws 1937, Act 8488, § 24(c).

**5. Taxation ⇐593(2)**

In suit against Superintendent of Banks to recover deficiency in franchise tax paid by superintendent as liquidator of particular bank, superintendent had burden of proving that certain debts became "uncompensated losses" or "recoverable in part only" during particular year, within terms of statute specifying allowable deductions from income by which tax was measured, as respects both the fact of loss and the time of loss. Gen. Laws 1937, Act 8488, §§ 7, 8(d, e).

**6. Taxation ⇐386(1)**

Where bank's losses resulting from default in bonds held by it occurred before 1933, and the facts were known to an executive officer of the bank, such losses could not be deducted from income for 1933 as basis for computing franchise tax, notwithstanding that bonds were written down during 1933 on direction of Superintendent of Banks. Gen.Laws 1937, Act 8488, §§ 3, 4, 7, 8.

**7. Taxation ⇐386(1)**

Under statute providing that amount of franchise tax shall be final if no protest is filed within 60 days, amount of tax was not open to question by bank where no protest was filed, irrespective of whether true estoppel existed against taxpayer. Gen.Laws 1937, Act 8488, § 25.

---

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by the People of the State of California against Friend W. Richardson, as Superintendent of Banks of the State of California, to recover deficiency in franchise tax paid by defendant as liquidator of the Bank of San Pedro. From a judgment for plaintiff, defendant appeals on bill of exceptions.

Affirmed.

John Gee Clark, of Long Beach, for appellant.

U. S. Webb, former Atty. Gen., Earl Warren, Atty. Gen., and John L. Palstine, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The People sued the superintendent of banks to recover a deficiency in the franchise tax paid as liquidator of the bank of San Pedro. From a judgment for plaintiff the defendant has appealed on a bill of exceptions.

The bank closed on March 3, 1933, and one of its vice-presidents was named conservator, pursuant to the terms of section 135b et seq. of the Bank Act. Stat.1933, p. 319, Deering Gen. Laws, Act 652. On December 17, 1934, the conservator was removed and the bank was placed in the hands of a liquidator. On March 15, 1934, the conservator filed an income tax return

in which he deducted from the net income the sum of $65,000 representing the amount that had been written off on certain bonds upon the order of the superintendent of banks. This deduction was disallowed by the franchise tax commissioner and notice thereof given. The defendant filed no protest. Franchise taxes are to be rated on the basis of the net income of the previous year, hence, the controversy here relates to the proper tax to be paid by the bank in the year 1934 for the year subsequent to March 3, 1933, while the bank was in the hands of the conservator.

The appellant advances three grounds for reversal—that the franchise tax is chargeable only upon a bank "doing business within the limits of this State" (sec. 2, Franchise Tax Act, Deering Gen. Laws, Act 8488), and that the evidence is insufficient to support the finding that the bank was "doing business" in 1933; whether the bank was justified in deducting $65,000 from its net income because of bonds in default which were written down upon order of the superintendent of banks; and whether interest and penalties were chargeable during the period of operation by the conservator.

[1] There was sufficient evidence to support the finding that the bank was engaged in business during its operation under the conservator. We refer to a portion of it. The doors were kept open as usual during all banking days and hours. Deposits were accepted under certain restrictions. There were checking accounts. Safety deposit boxes were available to customers throughout the period. Collections were made in the usual manner and upon the customary collection charges. Rentals of other offices in the bank's property were collected and handled in the usual manner. During this period the bank officials were attempting a reorganization and the activities above noted were carried on to hold the clientele until such reorganization might be effected.

[2, 3] Under the same heading the appellant argues that the finding is contrary to law because when a bank closes it ceases to do business and is in liquidation —that there is no difference in the relationship or situation between a conservator and a liquidator. The argument loses sight of the primary purpose of the emergency legislation of 1933. These sections of the Bank Act, 135b to 135f inclusive, were added in 1933 for the purpose of providing a means by which the bank assets might be conserved and the bank rehabilitated without complete liquidation. Provisions for the appointment, conduct, and removal of the conservator are found in these new sections of the code, all of which are designed to carry the bank along until, through reorganization or federal aid, it may be permitted to continue to conduct its business as before. Section 136 et seq., which precede the above sections in time of enactment, provide generally that the superintendent of banks may take possession of the assets of a bank in financial distress and "shall proceed to liquidate the affairs thereof". Cases holding that the powers and relations of a conservator are the same as those of a statutory receiver are of no assistance. None involves the statutory plan found in the Bank Act. The purpose of the statute is plain—that a conservator may be appointed when the superintendent of banks deems that the affairs of the bank are in such condition that, through temporary administrative control, its assets may be conserved and its affairs put in order so that it might continue its business without complete liquidation. The portions of the act relating to the appointment of a liquidator are made specially applicable to a case where the superintendent finds the affairs of the bank in such condition that they must be wound up, or "liquidated". Here the superintendent, acting under the authority of section 135c of the act, authorized the conservator to carry on the business of the bank with some limitations, and the trial court held that the bank had engaged in business through him. Under such circumstances there is no escape from the conclusion that the bank was liable for payment of the franchise tax for that period.

[4] As to the third question stated by appellant, the argument is that since the affairs of the bank were in custodia legis the judgment erroneously includes interest and penalties on the unpaid tax. The respondent replies that no penalties were imposed and that interest is permissible under the express terms of the franchise tax act. Both parties cite and rely upon Carpenter v. Peoples Mutual Life Ins. Co., 10 Cal.2d 299, 74 P.2d 508. It does not aid either side. The case holds that a "gross receipts" tax levied under article XIII, section 14 of the Constitution, may carry penalties for delinquency, but since the

parties conceded that the claim did not bear interest, the court did not decide whether interest was chargeable upon such a claim. Here the statute is plain. Section 24, subdivision (c), Act 8488, reads: "If the tax imposed by this act (whether determined by the commissioner or the taxpayer) or any installment or portion thereof is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax interest upon such unpaid amount at the rate of six per cent per year from the date prescribed for its payment until it is paid." The answer to appellant's inquiry as to interest is found in the statute; hence, authorities from other jurisdictions condemning the practice of charging interest are not controlling. The matter of penalties is out of the question because no penalties were imposed.

The question relating to the write down of the defaulted bonds is more a question of accounting and of procedure than one of law. Under the provisions of the franchise tax act the bank was required to pay an annual tax, "in lieu of all other taxes and licenses, State, county and municipal, * * * upon the basis of its net income for the next preceding fiscal or calendar year." Sections 3, 4. Under section 8 of the act certain deductions are permitted in measuring the net income. In preparing its return and computation of the net income for the calendar year, 1933, the San Pedro bank deducted $65,000 as "losses" or "bad debts" represented by bonds of three other corporations which had defaulted in the payment of interest. On December 30, 1933, upon the order of the superintendent of banks, the conservator "wrote down", or charged off on its books the sum mentioned in order to have the books show the "new market value" of the bonds as of that date. The tax commissioner refused to accept this write down and this is the meat of the present controversy. It is the position of appellant that the order of the superintendent of banks is alone sufficient to permit the deduction. The respondent contends that the deduction was improperly made for the year 1933, and that appellant has failed to follow the required procedure for an adjustment of the amount of tax due.

[5, 6] Section 8 of the franchise tax act enumerates the deductions that may be made in the return of the net income upon which the amount of the franchise tax is reckoned. "Net income" is defined in section 7 as "the gross income less the deductions allowed". It is necessary then to find explicit deductions in the following sections to support a claim that any single deduction from the gross income should be made. The willingness of the bank to comply with the order of the superintendent to write down these bonds can have no bearing upon the statutory deductions which are allowable in estimating net income. Whether appellant claims the right under subdivision (d) or (e) of section 8 does not appear. If through the default in payment of interest the bonds become "uncompensated losses * * * sustained during the income year", the burden of proof was on appellant to show both factors—the fact of loss and the time of loss. If appellant rests on subdivision (e)—that this is a debt "recoverable in part only"—the burden is again upon him to show what part if any is chargeable to the income year of 1933. To the contrary, the evidence discloses that all these "losses" occurred prior to the income year of 1933, and that these facts were known to an executive officer of the bank. They were not deductions which under the act could be made in toto on the income of 1933. A similar situation was considered in Freeman-Dent-Sullivan Co. v. United States, D. C., 21 F.Supp. 972, 977, where the court said: "Under the evidence in this case, if the debt under consideration was partially worthless in 1933, it was, under facts known to the taxpayer, partially worthless prior to 1933. It follows that partial worthlessness should have been ascertained prior to 1933. In other words, it was not ascertained in the sense of the statute within the taxable year. In any event, there is substantial evidence to support the finding of the Commissioner that the part of the debt in question was not ascertained within the taxable year to be worthless."

[7] The trial court found that the defendant was estopped from questioning the amount of the tax due because of his failure to protest within sixty days after notice to him from the tax commissioner. The appellant criticizes the finding on the ground that the essential elements of an estoppel were not proved. This may be conceded, but a true estoppel is not necessary to support the judgment. Section 25 of the Franchise Tax Act provides a scheme for protest, hearing before the commissioner, and appeal to the state board of equalization. Definite times for these

proceedings are specified, and, as in similar tax proceedings, time is of the essence, hence mandatory. Sixty days is given to file the original protest. "If no such protest is so filed *the amount* of the tax shall be final upon the expiration of said sixty-day period." It needs no judicial interpretation or construction to explain such plain language. No protest was filed at any time and *the amount* of the tax is no longer open to question.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.




## ISENBERG v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. *

Civ. 12483.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1940.

Rehearing Granted March 11, 1940.

**1. Criminal law ⇐1081**

Notice of an appeal in criminal case from inferior court to superior court of county must be in writing and must be filed within 5 days after rendition of judgment or order from which appeal is taken. Pen. Code, § 1468, as amended by St.1935, p. 2146, § 3; Const. art. 6, § 1a, subd. 5.

**2. Criminal law ⇐1081**

Where accused was convicted of misdemeanors in justice's court, notices of appeal to superior court, which were not filed until 8 days after rendition of judgment of justice's court were insufficient and superior court was without jurisdiction of appeal, and the notices could not be validated by stipulation or other action of the parties to proceedings, or by order of the court. Pen. Code, § 1468, as amended by St.1935, p. 2146, § 3; Const. art. 6, § 1a, subd. 5.

**3. Criminal law ⇐1081**

Where accused was convicted of misdemeanors in justice's court, fact that oral notices of appeal to superior court were given at time judgment of justice's court was pronounced did not authorize superior court to proceed with case on appeal, where written notices of appeal were not filed until 8 days after rendition of judgment. Pen.Code, § 1468, as amended by St.1935, p. 2146, § 3; Const. art. 6, § 1a, subd. 5.

**4. Criminal law ⇐1081**

The only effective notice of appeal to superior court from conviction in inferior court is one given in writing by defendant or his counsel and filed with clerk, or in certain cases with magistrate, within 5 days after rendition of the judgment or order appealed from. Pen.Code, § 1468, as amended by St.1935, p. 2146, § 3; Const. art. 6, § 1a, subd. 5.

Original mandamus proceeding by J. W. Isenberg against the Superior Court of Los Angeles County, the Appellate Department thereof, and the Honorable Hartley Shaw and others, judges thereof, to compel the Appellate Department of the Superior Court to hear and determine certain appeals.

Alternative writ discharged, and peremptory writ denied.

Ray Howard, of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, and Douglas De Coster, Deputy County Counsel, both of Los Angeles, for respondent superior court.

WHITE, Justice.

Mandamus to compel the appellate department of the superior court of Los Angeles county to hear and determine certain appeals.

The record presents the following facts: Petitioner was convicted in the justice's court of San Jose township in Los Angeles county, on July 28, 1939, of certain misdemeanor violations charged in four complaints filed against him. On said date and immediately following the pronouncement of judgment, petitioner, as defendant in said cases, gave oral notices of appeal, which were entered by the clerk in the docket of the justice's court of said township. Thereafter, some eight days later, on August 5, 1939, defendant filed written notices of appeal and subsequently perfected his record, and the causes came before the appellate department of respondent court, wherein decision was rendered on Septem-



*For subsequent opinion see 102 P.2d 552.

ber 14, 1939, holding that the written notices of appeal had been filed too late, that the oral notice could not correct this tardiness, and that said appellate department of the superior court was therefore without jurisdiction to pass upon said appeals. Thereupon petitioner sought and obtained from this court an alternative writ of mandate and respondent court has filed a general demurrer to the petition.

It is the contention of respondent court that rule 2 of the rules of the judicial council of the state of California pertaining to criminal appeals to the superior court from inferior courts establishes the correctness of the decision of such court in holding that it was without jurisdiction to proceed with the appeals herein. In this claim respondents must be upheld. Subsection 5 of section 1a of article VI of the Constitution of this state expressly authorizes the judicial council to adopt rules of practice and procedure for the several courts not inconsistent with the rules that are now or that may hereafter be in force. To give effect to this constitutional provision, the legislature in furtherance thereof amended section 1468 of the Penal Code in 1935 (St.1935, p. 2146, § 3) to provide that "Appeals to the superior courts shall be heard and determined, the decisions thereon shall be remitted to the inferior courts, *and the records on such appeals shall be made up and filed* in such time and manner as shall be prescribed in rules to be promulgated by the Judicial Council. * * *" (Italics added.) Pursuant to the authority thus conferred, the judicial council promulgated rules for "Criminal Appeals to the Superior Court From Inferior Courts", which rules became effective on July 1, 1936. Among those rules we find rule 2 providing in the following language the manner in which an appeal shall be taken to the superior court: "An appeal to the Superior Court of the county in which such inferior court is located is taken by filing written notice of appeal in the court wherein the judgment or order appealed from is rendered, within five days after the rendition of such judgment or order. Such written notice of appeal shall be filed with the clerk of said court, or, if there be no clerk, with the magistrate therein presiding. The date of such filing shall be the effective date of the taking of such appeal. If such notice of appeal is not filed as aforesaid within the time required, such appeal shall be void and of no effect."

[1, 2] From the foregoing it is at once apparent that the notice of appeal must be in writing and the same must be filed within five days after the rendition of the judgment or order which it is sought to have reviewed. Having been filed eight days after rendition of the judgment, the notices of appeal herein simply amounted to what has been characterized as "a tardy notice of appeal" (People v. Megugorac, 12 Cal.2d 208, 82 P.2d 1108, 1109), and the same cannot be validated even by stipulation or other action of the parties to the proceedings, or by order of the court. The language of rule 2, supra, of the judicial council is plain and unequivocal. It is definite both as to the form of the notice of appeal to the superior court from a judgment or order of an inferior court and as to the time within which such notice must be filed. In People v. Lewis, 219 Cal. 410, 413, 27 P.2d 73, 74, and cases therein cited, it was held that "The requirements as to the time for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions."

[3, 4] The suggestion that when the oral notices of appeal were given at the time judgment was pronounced, and were by the clerk written in the docket as follows, "Oral Notice of Appeal Given", the requirements of the law were satisfied, is answered by the language used in People v. Lewis, supra: "The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where, through inadvertence or mistake of a party or his attorney, notice of appeal is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice." The only effective notice of appeal is one given in writing by the defendant or his counsel and filed with the clerk, or in certain cases with the magistrate, within five days after rendition of the judgment or order from which the appeal is taken.

For the reasons herein stated, the respondent court's demurrer is sustained; the alternative writ heretofore issued is discharged, and a peremptory writ is denied.

We concur: YORK, P. J.; DORAN, J.

37 Cal.App.2d 246

**PEOPLE v. GAY et al.**

Cr. 3273.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1940.

**1. Criminal law ⇐1165(1)**

Under established rules which permit a jury to derive the truth from conflicting testimony in a criminal prosecution, District Court of Appeal cannot disturb a verdict, in absence of prejudicial error otherwise indicated. Pen.Code, § 1042.

**2. Robbery ⇐24(1)**

Evidence sustained convictions for robbery in the first degree.

**3. Criminal law ⇐641(3)**

In robbery prosecutions, refusing to permit defendant to substitute other counsel for public defender after trial of case and prior to presentation of argument on motion for new trial was not error because public defender declined to make an argument, and because public defender allegedly failed to obtain witnesses as directed by defendant, allegedly treated defendant as though he were guilty, suggested that he plead guilty, and ignored defendant's request to have witnesses excused from the courtroom during the trial.

**4. Criminal law ⇐322**

Public defender presumably did his duty in representing the defendant.

**5. Criminal law ⇐722½**

In robbery prosecutions, the district attorney was within his rights in referring to defendant's former convictions of felonies, where defendant was accused of such prior convictions and testified to previous convictions.

**6. Criminal law ⇐857(1)**

The fact that jury took only 25 minutes to return verdicts in robbery prosecutions did not indicate error, on ground that jury was unable to review the evidence in such short time, where the testimony of the witnesses that defendant committed the robberies was clear and convincing.

---

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Charles Baxter Gay and Verne B. Shaffer were accused by informations of robberies in the first degree. Verne B. Shaffer was convicted, and he appeals.

Affirmed.

Verne B. Shaffer, in pro. per.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant and codefendant Gay were accused by informations of three robberies in the first degree, after prior convictions for felonies. They were tried jointly and four verdicts were returned against Shaffer, who appeals from judgments after convictions by a jury of said crimes.

The bases of his appeal are as follows: (1) insufficiency of the evidence to sustain the judgment; (2) misconduct of his own counsel; (3) misconduct of the district attorney; and (4) misconduct of the jury.

(1) Appellant was identified as one of three armed men who on February 17, 1939, entered the Sequoia Importing Company, tied up the manager, took seven guns and $50.17 in cash; he was identified as one of two armed men who entered the office of George C. Lord on March 3, 1939, and took $110; he was identified by three witnesses as one of those who robbed one Neft of over $13,000 worth of jewelry and diamonds on March 16, 1939, all robberies in the city of Los Angeles.

[1, 2] The testimony of the witnesses as to each of the three robberies was clear and convincing. Every witness called, except one, identified appellant as one of the armed burglars. Under the established rules which permit the jury to derive the truth from conflicting testimony (Pen. Code, sec. 1042) we cannot disturb the verdict in the absence of prejudicial error otherwise indicated.

[3, 4] (2) The contention of appellant that he was not properly represented by the public defender and that the court erroneously refused to permit him to substitute other counsel is without merit. Appellant requested the discharge of the public defender as his counsel after the trial of the case and prior to the presentation of the argument on the motion for a new trial. When counsel presented said motion, for reasons satisfactory to himself, he declined to make an argument whereupon the court permitted the defendant himself to do so. The claims made by the de-

fendant were to the effect that his counsel failed to obtain witnesses as directed by defendant; that said counsel had treated him as though he were guilty instead of innocent; that counsel suggested that he plead guilty to the charge and ignore his request to have the witnesses excused from the courtroom during the trial. Disagreement between appellant and his counsel over these contentions may explain counsel's refusal to argue said motion. There is nothing in the record that would warrant a reversal of the judgment upon any of the contentions thus made. The presumption is that his counsel had done his duty and since the record discloses no point in respect to which counsel caused appellant to suffer prejudice and since the trial court observed counsel's conduct and declined to yield to appellant's importunities, the exercise of discretion in denying the motion will not be disturbed by the appellate court.

[5] (3) As to the prejudicial error claimed to have been committed by the district attorney in his examination of witnesses, no reference is made to any particular question so propounded and we find no such question directed to any witness. If the district attorney made reference to appellant's former convictions of felonies, he was strictly within his rights to do so for appellant was accused of such prior convictions and he testified that he had been convicted of robbery in 1914 in Washington, of burglary in 1926 and of robbery in 1936 in California. Because of those facts, the Braun case, People v. Braun, Cal.Sup., 92 P.2d 402, cited by appellant, is not applicable.

[6] (4) Appellant complains that the jury took only twenty-five minutes to return their verdicts and that in such time they were unable to review the evidence in all of the cases presented. In this the jury deserves commendation; they had observed an array of witnesses point to appellant as one of the men who vi et armis took the properties of themselves and their associates, and had heard the details of a series of major crimes committed by defendant over a period of twenty-five years and of his consequent terms of penal servitude. In view of the evidence presented, they were only reasonably expeditious in their deliberations.

The judgments and orders appealed from are affirmed.

We concur: WOOD, J.; McCOMB, J.

37 Cal.App.2d 249

## BERKOWITZ v. PALM SPRINGS LA QUINTA DEVELOPMENT CO.

Civ. 12417.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1940.

**1. Action ⇐65**

Plaintiff's cause of action must exist at the time plaintiff files his complaint, and rights of parties must be judged by conditions existing at the time action is commenced.

**2. Corporations ⇐155(5)**
**Master and servant ⇐80(2)**

An employee's cause of action against employer to recover sums representing a bonus and dividends on stock was prematurely brought, where employee had agreed to be bound by action of employer's board of directors and such board had provided for payment of bonus and dividends on date subsequent to that on which employee filed his complaint.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by L. N. Berkowitz against the Palm Springs La Quinta Development Company to recover an amount alleged to be due plaintiff under a contract of employment. From a judgment for plaintiff, defendant appeals upon the judgment roll.

Judgment modified and, as modified, affirmed.

Hugo H. Harris, of Los Angeles, for appellant.

Combs & Murphine, of Los Angeles, for respondent.

WOOD, Justice.

The action was commenced by plaintiff to recover an amount alleged to be due under the terms of a contract whereby defendant employed plaintiff to render services for a salary of $300 per month for a definite period. On his salary claim the court gave plaintiff judgment in the sum of $1,687.05. Defendant makes no criticism of this part of the judgment. Plaintiff also seeks to recover the sum of $5,800, which he claims defendant agreed to pay him as a bonus, and the further sum of

$2,500, which he claims is due him as a dividend upon his shares of stock in defendant corporation. Defendant contends that plaintiff's claims for the bonus and dividend will not mature until October, 1940. In addition to the judgment for $1,687.05 on the salary claim, the trial court rendered judgment for the sum of $8,300, but provided that as to the last-mentioned sum the judgment should not bear interest until and from October 15, 1940, and further provided that issuance of execution be stayed as to the sum of $8,300 until and to October 15, 1940. Plaintiff was allowed his costs of suit.

The appeal is upon the judgment roll. From the findings it appears that at a meeting of the board of directors of defendant corporation held on October 15, 1937, a resolution was adopted declaring a dividend of $100 a share, including the twenty-five shares owned by plaintiff, but provided therein that "the same shall be evidenced by non-negotiable, non-interest bearing promissory notes of defendant corporation, due on or before October 15, 1940". At the same meeting a resolution was passed providing for the payment of a bonus for services rendered to several persons, among them plaintiff herein, and further provided that this bonus as well as the one voted at an earlier meeting, "be evidenced in non-negotiable, non-interest bearing notes of defendant corporation due on or before three years from October 15, 1937". The court further found that plaintiff and others, immediately following the adoption of these resolutions, "in writing, approved, ratified and confirmed the passage of the resolutions". Thereafter defendant executed its note, due on or before October 15, 1940, payable to plaintiff in the sum of $8,300, "which said note was and is held by Edward Glick for the use and benefit of said plaintiff, together with notes of like maturity, to the other persons named in said resolutions".

[1, 2] It is thoroughly settled that plaintiff's cause of action must exist at the time he files his complaint and that the rights of the parties must be judged by the conditions existing at the time the action is commenced. 1 Cal.Jur. 377, and cases there cited. From the findings of the trial court it plainly appears that plaintiff agreed in writing to be bound by the action of the board of directors providing for the payment of his bonus by defendants in October, 1940. The trial court clearly was of the opinion that the sum of $8,300 was not due at the time of the commencement of the action, for it provided that this sum should not bear interest until after October 15, 1940, and stayed the issuance of execution thereon until the last-mentioned date. Defendant's contention that plaintiff's claim for the bonus and the dividend was prematurely brought must be sustained for it is apparent that the cause of action for these two items did not exist when the action was commenced. In Landis v. Morrissey, 69 Cal. 83, 87, 10 P. 258, such a contention is referred to as "a perfect defense".

The judgment is modified by striking therefrom the words, "Nine thousand, nine hundred eighty-seven and 05/100 Dollars ($9,987.05)" and inserting in lieu thereof the words, "One thousand six hundred eighty-seven and 05/100 Dollars", and by striking out the remaining part of the judgment. As so modified the judgment is affirmed. Defendant shall recover costs on appeal.

I concur: MOORE, P. J.

McCOMB, Justice (concurring).

I concur:

However, the statement in the main opinion, "It is thoroughly settled that plaintiff's cause of action must exist at the time he files his complaint and that the rights of the parties must be judged by the conditions existing at the time the action is commenced," should be modified to show that, in a case where a complaint on an insurance policy fails to allege compliance with a clause in the policy to the effect that no action shall be brought against the insurer until a valid judgment shall have been recovered against the assured (if a valid judgment is recovered against the assured subsequent to the filing of the complaint and prior to the trial, the complaint is amended to show this fact, and the insurer has denied liability on the policy), then the complaint as amended will be deemed to be sufficient. See Grant v. Sun Indemnity Co., 11 Cal.2d 438, 80 P.2d 996.

37 Cal.App.2d 311

## PEOPLE v. CASTRO.

Cr. 3274.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1940.

**1. Homicide ⇐253(1), 255(2)**

**Evidence was insufficient to sustain conviction of murder in the first degree, but revealed the offense of voluntary manslaughter. Pen.Code, § 192.**

**2. Homicide ⇐347**

**Where evidence was insufficient to sustain first degree murder conviction, but revealed rather merely voluntary manslaughter, District Court of Appeal ordered judgment modified, and remanded cause with directions to enter a judgment finding defendant guilty of voluntary manslaughter. Pen. Code, §§ 192, 1181.**

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Jose Castro was convicted of murder in the first degree, and he appeals.

Judgment modified, and cause remanded, with directions to enter judgment finding defendant guilty of manslaughter.

Stanley Visel, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged with the murder of his wife, Gloria Castro, was tried by the court sitting without a jury, was found guilty of murder in the first degree and sentenced to San Quentin prison for life. Upon this appeal it is contended that the judgment of conviction "should be either reversed or the degree of crime reduced from first degree murder to a lesser degree", in other words, that the evidence is insufficient to warrant a judgment of first degree murder.

At the trial, appellant took the stand in his own defense and gave his version of the crime in terms almost identical with a statement which he made to the officers at the time of his arrest, substantially to the following effect:

He resided with his wife and three small children, ranging in age from five years to ten months, in one room in a rooming house on the east side of Los Angeles, and was steadily employed in a menial position at the Biltmore Hotel, where he worked nights. On June 1, 1939, when he returned home from his work shortly after 1 o'clock in the morning, he found his children sleeping in his room but his wife was absent. After speaking to a Mexican couple, who lived in a nearby apartment, about taking care of the children, he went to the lavatory and while there he heard his wife come into the house, accompanied by her brother, both talking loudly and apparently in an intoxicated condition. He heard his wife ring a bell for the landlady and ask for another room. Meanwhile appellant went upstairs to a porch on the second floor of the house where he could "watch everything". The landlady located an unoccupied room to which appellant's wife took the three children, the blankets from the bed and other personal effects. The appellant then went to his room and finding it in a disordered condition, the blankets gone and the mattress wet, he rang for the landlady whom he asked for 50 cents so he could get another room. The landlady gave him the money and said to him, "Well, Joe, I glad to see you find your wife come drunk, you know, every night take a drink and come drunk." Appellant then told the landlady and her husband that he had a card from a lawyer and wanted to make a complaint about his wife; that he wanted to get a divorce and take the children. Appellant then went out to get a cup of coffee and later returned and stayed in his room until 6 o'clock when he went next door to a restaurant and drank two bottles of beer and brought a quart of beer into his room and drank that. He remained in his room until he heard the children outside on the porch when he went out and saw them running around barefooted and partly dressed, whereupon he went to his wife's newly acquired room and asked her "Why don't you dress the babies?" The argument which then ensued, as told in the words of appellant, was as follows: "I tell her its a shame to see the babies that way. She say 'what the hell do you care you son-of-a-bitch, its none of your business'. I tell her, 'Sure I care, its my babies.' And she say, 'Well you go to hell' and I tell her 'I call the cops last night and the cops see the babies alone,' and then my wife say 'Tell them you and the cops dirty son-

of-a-bitches.' She say, 'I not afraid of the cops.' My wife say, 'Anyway, what the hell you want in this room you son-of-a-bitch.' She got up from the bed and pick up the knife from under the pillow?

"Q. What kind of a knife? A. Pearl handle.

"Q. Was she drunk? A. Yes.

"Q. Was the knife open? A. No, she open it.

"Q. Then what did she do? A. She try to stick me.

"Q. Did she have the knife in her hand? A. Yes.

"Q. She was holding the knife in her right hand? A. Yes. * * * I hold her arms (indicating holding wrists), she pushed me against the wall; she was trying to get loose and I tell her throw the knife on the floor and she say 'you and who else is going to make me drop the knife, you son-of-a-bitch', and while I still have hold fighting she say 'you son-of-a-bitch, you God-damn fool', she stick herself in the stomach. Then she drop the knife on the floor and I pick it up myself and I make pass at her with knife (indicating side-swipe with right hand).

"Q. Did you cut her? A. I don't know.

"Q. How many swings did you make. A. Just one. * * *

"Q. There were two cuts on the body beside the one on the abdomen, one on the neck and one on the wrist—how do you account for those. A. I don't know, I was mad. Just one swipe."

Taking the knife with him, he then left the house and was apprehended eleven days later in Riverside.

The autopsy surgeon testified that the prime cause of the death of appellant's wife was the stab wound in the abdomen; and that there was also found a clean cut wound four inches long and one-half inch deep across the upper neck region; and a cut two inches long and one-half inch deep across the inner flexor surface of the right elbow joint, as well as a cut across the palmar surface of the fingers of the left hand.

After the last rites of the Catholic Church had been administered to Mrs. Castro just before her death, officer Romero interviewed her and asked: "Q. How do you feel? A. Oh, I am going to die. I know I am going to die." Romero then said to her: "Knowing that you are going to die, you wouldn't want some innocent person to be accused of this stabbing? A. No." Then officer Romero asked her, "Do you still maintain it was your husband, Jose Castro, who stabbed you?" and she replied, "Yes."

A transcript of the evidence given at the preliminary examination before the judge of the municipal court who issued the commitment herein was introduced. This transcript contains testimony given by the brother of Mrs. Castro to the effect that appellant had quarreled with his wife and had struck her with his hand "a few times" previous to the occasion which resulted in her death. It also contains testimony of the landlady from whom appellant had rented his apartment that, during the time the Castros lived in her house, she never heard them quarrel; also that about 10 o'clock in the morning of June 1, 1939, she heard a scream and when she went to investigate it, she met appellant in the hall; that she asked him what was the matter, and he replied, "Nothing"; that he had blood on his hands; that she then heard another scream and went to Mrs. Castro's room where she found her lying on the floor bleeding profusely from a wound in her abdomen; that she asked her what was the matter, and Mrs. Castro told her "to call the ambulance right away * * * that Joe had slashed her."

[1] While the record reveals that there had been some arguments or quarrels between appellant and decedent, it was shown by the testimony of the landlady of the apartment house where this couple lived that she had never heard them quarrel. Taken as a whole, the evidence presented falls short of the modicum required for a conviction of murder of the first degree, in that it fails to show that the injuries which decedent suffered were inflicted by appellant "with that intent or that malice aforethought which is a necessary ingredient of the crime of murder". People v. Kelley, 208 Cal. 387, 393, 281 P. 609, 611. The attending circumstances neither indicate an abandoned and malignant heart on the part of appellant, nor portray a wilful, deliberate or premeditated killing, but reveal a crime committed "upon a sudden quarrel or heat of passion", i. e., voluntary manslaughter. Sec. 192, Pen.Code.

[2] Following the Supreme Court in its interpretation of section 1181 of the Penal Code in the case of People v. Kelley,

supra, 208 Cal. at page 391, 281 P. 609, it is ordered that the judgment of the lower court of murder of the first degree be modified. The cause is remanded to the trial court with directions to enter a judgment against appellant finding him guilty of manslaughter, and thereupon to pronounce judgment against him as prescribed by law.

We concur: DORAN, J.; WHITE, J.




## In re ARNOLD'S ESTATE.*

## PETERSON v. LOGAN et al.

Civ. 6373.

District Court of Appeal, Third District, California.

Feb. 9, 1940.

Hearing Granted April 8, 1940.

**1. Judgment ⇐199(1)**

Trial court's right to set aside a verdict and enter a contrary judgment is the same as its right to grant a nonsuit.

**2. Wills ⇐324(1)**

In determining whether evidence produced by contestant in will contest is sufficient to require submission of case to jury, the same rules apply as in civil cases.

**3. Wills ⇐324(1)**

In determining whether evidence produced by contestant in will contest is sufficient to require submission of case to jury, every favorable inference fairly deducible and every favorable presumption fairly arising from evidence produced must be considered as facts proved in favor of contestant, and where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, trial court must take view most favorable to contestant.

**4. Wills ⇐324(1)**

In determining whether evidence produced by contestant in will contest is sufficient to require submission of case to jury, all evidence in favor of contestant must be taken as true, and if contradictory evidence has been given, it must be disregarded.

**5. Wills ⇐324(1)**

In will contest, if there is any substantial evidence tending to prove in favor of contestant all the facts necessary to make out his case, contestant is entitled to have case go to a jury for verdict on merits.

**6. Wills ⇐50**

A testator is of "sound and disposing mind and memory" if, at time of making his will, he has sufficient mental capacity to be able to understand nature of the act he is doing, to understand and recollect nature and situation of his property, and to remember and understand his relations to persons who have claims upon his bounty and whose interests are affected by provisions of instrument.

[Ed. Note.—For other definitions of "Sound Mind and Memory," see Words & Phrases.]

**7. Wills ⇐55(1)**

In will contest, evidence justified finding that testator was not competent to make the will on date in question.

**8. Wills ⇐341**

If upon the evidence adduced in will contest reasonable men might have differed as to whether testator was of unsound mind, a motion for judgment notwithstanding verdict for contestant should have been denied.

**9. Wills ⇐53(2)**

The circumstances relating to conduct and physical condition of testator prior and subsequent to making of will could properly form a basis for jury's conclusion that testator was not competent to make the will on date in question.

**10. Wills ⇐31**

Ability to transact ordinary business is not the standard of legal capacity to execute a will.

**11. Courts ⇐89**

In determining question of testamentary capacity, the decision of each case must ultimately rest upon its own facts.

**12. Wills ⇐386**

On appeal in will contest, District Court of Appeal could not weigh the evidence.

**13. Wills ⇐55(1)**

Although a will itself may be some evidence of testamentary capacity, it is not conclusive to the extent that all other evidence to contrary must be disregarded in will contest.

*For subsequent opinion see 107 P.2d 25.

**14. Wills ⇐341**

**On a motion for judgment for proponents notwithstanding verdict for contestant in will contest, the court was bound to resolve in contestant's favor all conflicts of evidence and to give contestant the benefit of all legitimate inferences.**

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Hobart L. Arnold, deceased, between Earl W. Peterson, contestant, and Vera L. Logan and another, executrices of the last will and testament of Hobart L. Arnold, deceased, proponents. From a judgment for proponents notwithstanding a verdict for contestant, contestant appeals.

Reversed, with directions.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

By this action appellant seeks to contest the will of Hobart L. Arnold, deceased, his uncle, upon two grounds—undue influence and unsoundness of mind. The trial court granted a motion for nonsuit as to the former, and upon the latter issue the jury found in favor of appellant. Judgment notwithstanding the verdict was entered upon the motion of respondents, and the appeal is from such judgment.

The will in question is in the handwriting of the testator, and reads as follows:

"May 6, 1936.

"I, Hobart L. Arnold, of Santa Rosa, Sonoma County, California, being of sound and disposing mind and memory, and not acting under undue influence of any person whomsoever, do make, publish and declare this to be my last will and testament. I am single. I have no children. I do give and bequeath my property to the persons named in this will.

"To Earl W. Peterson, of Modesto, One Thousand Dollars.

"To Walter Staley, of South Laguna, Orange County, One Thousand Dollars.

"To Florence Wells Lancini, One Thousand Dollars.

"To Dresse Wells, Five Hundred Dollars.

"To Lois Hardisty, of Santa Rosa, Five Hundred Dollars.

"To Mabel Baudau, of Windsor, One Thousand Dollars.

"To Mrs. M. A. Parrish, of 641 Sonoma Ave., Santa Rosa, One Thousand Dollars.

"To Frances Carrington, of Rincon, Valley, and Vera Logan of 925 Wright St., Santa Rosa, I leave the rest of my estate, to share alike of what stocks, bonds, real estate personal or whatever I may own at the time of my death. I appoint Frances Carrington and Vera Logan as executrixs of my estate without bonds.

"Signed this 6th day of May, 1936.

"Hobart L. Arnold."

[1-5] Taking up first the right of the court to render judgment notwithstanding the verdict, "The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit". Card v. Boms, 210 Cal. 200-202, 291 P. 190, 191. In Estate of Arnold, 147 Cal. 583-586, 82 P. 252, 253, the rule in respect to the conditions under which a nonsuit may be granted is thus stated: "In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence *tending* to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." (Italics ours.)

[6] In determining the quantum of evidence necessary to make out a case upon the issue of unsoundness of mind, we have been guided by the general rule laid down in Estate of Sexton, 199 Cal. 759-764, 251 P. 778, 780, where it is said: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient

mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."

The record shows that the testator had resided in the city of Santa Rosa for a number of years. In 1915 his wife inherited personal property and cash amounting to some $50,000. For many years prior to the date of the will he was addicted to using intoxicating liquor, to a degree which was excessive in the extreme. His family physician and numerous citizens testified that he was continuously drunk. His wife died in 1935, and he succeeded to all her estate, which then had an appraised value of $53,661. After her death he became despondent and morose, and continued to consume intoxicating liquor in an increasing amount, resulting in several treatments in the hospital for delirium tremens. In March, 1936 a woman, Vera Logan, became interested in him. She was then living with a man who was not her husband. She took testator to her house to live, when he was in a drunken stupor, in which condition he remained for several days, when she had him removed to a hospital for treatment of delirium tremens. She went around to various places with him, and drank with him on some occasions. She secured from testator a power of attorney to withdraw funds from his bank, and the records show thousands of dollars drawn by her from his account, for various purposes. One day she found him dead in her house. His will was discovered in a wallet in one of his pockets. She and another woman who was a stranger in blood to the testator were left the residue of the estate, valued at $20,000. Appellant, a nephew, was left the sum of $1,000. Several other bequests were made.

In a summary of the testimony we are about to give, only that which would tend to support the verdict is included. That of witness Pleth appears at some length, because we do not see how the question can be fairly presented without considerable elaboration. Dr. Valdemar Pleth was a regularly licensed physician practicing in the city of Santa Rosa, Sonoma county, and was the family physician of the testator and Mrs. Arnold for many years prior to their respective deaths. From 1929 up to about the year before the death of testator, Dr. Pleth frequently administered medical aid to him on account of being intoxicated. He testified substantially as follows:

"Prior to Mrs. Arnold's death I would say I treated Mr. Arnold for being drunk about two hundred times; that is, I examined him. Sometimes he got a prescription of bromides and sometimes atropin sulphate, and sometimes salt water for the purpose of dehydrating the brain. I gave him these because he had adema or swelling of the brain, to dehydrate those parts that were swollen, so that the pressure would be relieved on the nerves. When that happens the brain suffers adema and degeneration. The injection of salt and sugar drives the excessive amount of water away from the skin which covers the brain, and in that manner pressure on the brain is relieved. I gave him that treatment two or three dozen times at least. The cause of the swelling is alcoholic debauches. He was always intoxicated more or less. I have seen him in a condition of delirium tremens on several occasions. He would have hallucinations sensory and auditory. He was in his home when I first treated him for delirium tremens. I treated him in his home, in my office and in the hospital. His symptoms of hallucination were that he pointed out to me that he saw animals, snakes, green snakes on the floor and squirrels sitting on the bedposts, and other animals he could not describe. He would tell me what it was. I would try to have him chase them out. He said he heard voices of enemies speaking against him and threatening him. In the hallucinations the patient imagines he hears voices and sees things. In delirium tremens they imagine they see things and hear things which do not exist. The essential difference is that hallucination is the object of the senses and a delusion is a belief in the existence of a thing which has no foundation in fact. I would inject salt and sugar in the veins. Sometimes the attack would last another day. After an attack of delirium tremens he was extremely exhausted and unable to feed himself. I diagnosed him and treated him on that basis. *He was always intoxicated and did not know what he was doing. He was unaccountable.* Chronic alcoholism and psychosis blend with each other. He was unable to stand or walk and had no idea of the value of things around him. What we would call unaccountable. When a man is always intoxicated as he was, we call him incompetent and unable to observe, to base an opinion, handle his estate and posses-

sions. *I would call him incompetent as a thorough chronic alcoholic.* I have attended him when he was quite sober, but not entirely sober. On occasions he told me that he drank four or five quarts of either whiskey or brandy in three days in his home. During the time I observed him he was getting worse. The latter part of 1933 he lost all interest in his wife. He neglected her, he was not interested in his house, in his garden, most of the things that people who are normal are interested in. He neglected his clothes, did not wash his face, did not button his coat. Just prior to Mrs. Arnold's passing away he had a very bad attack of delirium tremens. The lady next door telephoned to me and I went out to his house. He threatened to commit suicide, saying, 'I am tired of living.' I found a bottle of strychnine under his bed mattress. At that time he saw snakes, squirrels and heard people speaking. We bundled him up and put him in the machine and took him to the general hospital and tied him to the bed and gave him bromides to quiet him and tried to get him to sleep. One who is suffering from chronic alcoholism as I have characterized Mr. Arnold—it is a progressive condition. He kept on drinking more and more, and consequently he neglected himself, his wife and his home duties, hearing voices, seeing animals. There are two things, both as a disease of the mind and the destruction of the brain tissues and of the brain itself. It has an effect on the central system, which is the brain and the spinal cord, and those suffering from chronic alcoholism suffer a degeneration of the cells of the brain on account of the frequent swelling of the membranes that are around the brain. It is pressed upon and that pressure interferes with the circulation and the nerves which extend out from the brain and as the centers of our coordinative movements and natural movements of our arms and legs are situated in the brain; therefore, we know that people who are subject to chronic alcoholism find it always interferes with the movements of the arms and legs, which it did in this instance. He could not walk. He would stagger. He could not hold a glass of whiskey. The faculty of thinking and reasoning is located in this part of the brain that we call, in the medical language, the left frontal convolution. There is a certain little fold in the brain up here. *In Mr. Arnold's particular case I believe that the power of thinking was interfered with, because of the fact that he was a chronic alcoholic.* We know that people who constantly drink have delirium tremens, cannot think in a rational manner. After an alcoholic debauch the circulation is interfered with, the flow begins to stop, the cells shrink up, and with the shrinking of the cells our thinking is interfered with. The cells are more or less destroyed in accordance with the amount of alcohol imbibed. *In Mr. Arnold's particular case, in my opinion, according to the rules of law of medicine, the brain cells situated in that portion of the brain where we do our thinking, were injured or damaged or destroyed.* After 1933 I had opportunity to observe Mr. Arnold's ability to remember. He had an impaired memory. The most peculiar erratic things that happen in the life of a chronic alcoholic are that he supposes things that never happened or took place. There is no fixed rule as to what may happen. He had a positive Romberg condition in which he could not balance. In most alcoholics, place them up against a wall, stand them up with their heels together and ask them to close their eyes. This is the test of Romberg and is used for the purpose of showing the balancing of the brain and in this section, the back part of the brain. He staggered all the time, not once in awhile, but always, and furthermore, he staggered with his eyes open. He had unequal pupils. One was bigger and larger than the other, which indicates a disturbance back in the brain. I looked into the back of his eyes with my ophthalmoscope to study the back of his eye where the optic nerve comes in from the brain, and they were interfered with to a certain extent. The man could hardly see. He staggered. He had to do so. In the background of his eye is what is called the optic nerve shooting off from the brain, that goes into the back of the eye and spreads out forming a cup, and that cup is situated in the form of a heart so all the impressions and all the pictures we see come to the point here. In order to see, we must have blood sent to the eye, and in order to breathe we must have blood sent to the brain and the lungs, and when we use a certain instrument to look into a person's eye, then we can see the size and the shape and the condition of the blood vessels in the bottom of that eye. If something is wrong he can see less blood going into that eye. It becomes contracted, smaller. They become tortuous or twisted, and all that I found in his eye on the many occasions when I used my ophthalmoscope. *It was indicative of a brain disturbance due to alcoholism. The cells of the brain gen-*

*erally degenerate as the blood supply is interfered with. The entire brain can be affected.* Mr. Arnold had trouble with his liver, cirrhosis of the liver, which in plain language means hardening of the liver to such an extent that his legs swelled up, and in English that is called dropsy. He had a dropsical condition and sometimes his abdomen swelled up and became filled with water, which was caused by alcoholism. He had arthritis, trouble with his joints and his spine, lumbago, and hardening of the arteries, arteriosclerosis and high blood pressure. The latter means a condition of the cells of the blood vessels were hardened to such an extent they sometimes became brittle. He suffered from an emotional disturbance, he told me. He wanted pleasant company. He feared certain enemies were talking about him. He liked to go out and have a good time, he said, once in awhile. On one occasion when he had a small attack of delirium tremens, I counted over $300 in bills lying on the kitchen table, on the oven of the stove and on the floor. He did not touch them, but I counted the money and there were two ladies in the room at that time. Mrs. Arnold brought Mr. Arnold to my office in Santa Rosa many times when I treated him for alcoholism. *He had no memory at all. He could not remember from one day to another the orders I gave him, so I had to give the orders to the other people with him and his wife.* What to eat and drink and what not to eat and drink, and to go to bed at seven o'clock. Common orders for sick people by a common doctor. We hold that when the cells of the brain are destroyed as the result of chronic alcoholism, they may be recovered to some extent in the very early stages if we can make them stop in time, but they never completely recover. *In the latter stages following excessives of alcoholic indulgences, those cells are absolutely destroyed and can never be replaced.* I saw Mr. Arnold several times after his wife died. A few times he came to the office, otherwise I met him on the street up until close to when he died. I would give him a test, eyes closed, stand up, and then he would keel over, which revealed that the center for coordinating movement was destroyed. He was always drunk. The last time I saw him was possibly a month before his death. *I considered him of unsound mind on May 6, 1936.*" (The date when the will was executed.)

Dr. A. A. Thurlow, witness called on behalf of contestant, testified:

"Regular licensed physician practicing in Santa Rosa since 1919. Practiced six or seven years in the Central Oklahoma Hospital where he took care of alcoholics and drug addicts. From that place I went into the army service and was two and a half years at Eldridge and about half a year at Talmadge where I came in contact with alcoholics. I knew Hobart Arnold during his lifetime and was called to give him medical aid on several occasions between September of 1935 and the spring of 1936. * * * Delirium tremens, if repeated over a period of years, causes an edema of the brain, an increase of serum which makes the brain tissues somewhat soggy, you might call it. It is invariably followed by deterioration of the brain cells. There would be an injury to the cortical nerve which is a part of the brain, and especially that is deteriorated by repeated edema of the brain. It is the external surface of the brain, the cortex, which is the functioning part of the brain. *Repeated conditions of delirium tremens and intoxication over a period of years would deteriorate all the brain structures and affects the mental functions.* I last saw Mr. Arnold in the spring of 1936 at the residence of Mrs. Logan. If there is an injury to the brain resulting from the excessive use of intoxicating liquors leading to delirium tremens, and repeated over a period of years, I would say there can never be a complete restoration of mind. I met Mr. Arnold once on the street in his lifetime and he was drunk. *During my observation of Hobart L. Arnold during his lifetime, at his home and in the hospital, and at the time when he was discharged from the hospital, I would say that he was of unsound mind.* On two occasions I held him in the hospital a little longer time in order to be able to arrange with someone to supervise him after he left the hospital because I did not think he had enough judgment to take care of himself."

It also appears from the record that Hobart Arnold, as a result of his continuous indulgence in intoxicating liquors, suffered recurrent attacks of delirium tremens, and the evidence discloses he was hospitalized for treatment of these attacks on the following dates: From September 27 to September 30, 1935; from January 15 to January 21, 1936; from March 6 to March 9, 1936; and that subsequently his attacks of delirium tremens became more frequent and of longer duration.

Numerous intimate acquaintances testified that the testator was almost continually intoxicated and irrational.

[7, 8] In our opinion the evidence was sufficient to justify a finding to the effect that the testator was not competent to make the will on the date it bears, giving contestant's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from it. The authorities are to the effect that if, upon the evidence adduced, reasonable men might differ as to whether the testator was of unsound mind, the motion should have been denied. That reasonable men have so differed is illustrated here by the fact that twelve men and women found one way on this question of fact, and the trial judge another.

[9] It is contended by respondents that there is no evidence showing the actual condition of the testator at the time the will was executed. Dr. Pleth, his family physician, testified that he considered Arnold of unsound mind on May 6, 1936, the date of the execution of the will. In addition to this, the facts and circumstances relating to the conduct and physical condition of the testator, prior and subsequent to the making of the will, may properly form the basis for the conclusion reached here by the jury. In Estate of Ivey, 94 Cal.App. 576-587, 271 P. 559, 563, it is said: "As hereinbefore suggested, while the ultimate question always is whether, at the very instant the will was executed, was the testator of sound mind, nevertheless testamentary capacity may be indicated by circumstances and conditions surrounding the testator both before and after the execution of the will, respectively, just as certainly, clearly, and unmistakably as by evidence of what was the general conduct and condition of the testator at the very instant that the testator affixed his name to the instrument."

See, also, Estate of Sexton, supra.

[10, 11] We have examined the authorities cited by respondents. They leave no doubt that the courts have gone very far in the matter of the quantum of evidence necessary to establish want of testamentary capacity—much further, in fact, than is required where the same issues are presented in other legal proceedings and actions. It has been held that an insane man may make a will. Estate of Chevallier, 159 Cal. 161, 113 P. 130. Ability to transact ordinary business is not the standard of legal capacity. Estate of Sexton, supra. To the average juryman, instructions embodying the foregoing rules of evidence must be bewildering in the extreme, and he is prone to conclude that it is just another exhibition of legal sophistry. If the rules governing proof of mental capacity were the same as in other cases, much of this confusion would be obviated. It may be that juries are too willing to seize upon a very slight pretext to overturn a will, but to many it appears doubtful if this is a justification for the courts to attempt a circumvention of this tendency by adding to the burden ordinarily imposed by law upon a party who has the burden of proving a fact. If we were to hold the evidence here to be insufficient, the rules stated would be still further extended. We have examined the authorities relied upon by respondents, and in none of the cases cited were the evidences of want of testamentary capacity as great in volume and probative force as we find here. As stated by Houser, J., in the Ivey case, supra: "After all that may be said or written affecting any particular case, the law as therein laid down has its application more peculiarly to that one case; and, while the principle of law therein announced may have its application to other cases, the decision of each case must ultimately rest upon its own facts."

[12, 13] Respondents also rely upon that line of cases which hold that proof of the habit of drinking intoxicating liquor is not sufficient to establish incapacity to make a will. Estate of Carithers, 156 Cal. 422, 105 P. 127. In that and similar cases there was no evidence which showed that the continued and excessive use of liquor had caused a *disease* and *destruction of the brain tissue,* resulting in loss of memory and the impairment of other faculties as related by Dr. Pleth. Nor can the positive testimony of the family physician that the testator was of unsound mind when the will was executed, be dismissed with the statement that he had not seen his patient often enough. That objection goes to the *weight* of the testimony, and we are not permitted here to weigh the evidence. The same rule applies to the argument that the will itself establishes the fact that there was testamentary capacity. It may be *some* evidence of the fact, but certainly it is not conclusive to the extent that all other evidence to the contrary must be disregarded.

[14] We are satisfied that the evidence shows, or tends to show, that the testator

did not have testamentary capacity at the time the will was executed, bearing in mind the rule that on a motion of this character it is the duty of the court to resolve in appellant's favor all conflicts of evidence and to give him the benefit of all legitimate inferences.

The judgment is reversed, and the trial court directed to enter judgment upon the verdict as rendered.

We concur: PULLEN, P. J.; THOMPSON, J.




37 Cal.App.2d 296

## PEAKE v. AZUSA VALLEY SAV. BANK.

Civ. 6320.

District Court of Appeal, Third District, California.

Feb. 14, 1940.

**1. Boundaries ⇐37(4)**

In suit to quiet title, evidence sustained finding that under deed conveying easterly 660 feet of two lots the true easterly boundary of property conveyed was westerly line of a bounding highway and not the center of such highway. Civ.Code, § 1112.

**2. Deeds ⇐118**

In absence of any circumstance indicating a more unusual and technical meaning of the word "lot" was contemplated by grantor, it will be presumed that grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of lot or parcel of land which is set apart for private use and occupancy.

[Ed. Note.—For other definitions of "Lot," see Words & Phrases.]

**3. Boundaries ⇐46(1)**

Where boundary line between two adjoining tracts is uncertain, adjoining owners may agree on a division line between them, which agreed line will then become boundary line between their properties.

**4. Appeal and error ⇐1009(3)**

Where there was a conflict in evidence in suit to quiet title, as to whether a boundary line was agreed upon between parties to suit, reviewing court was bound by finding of trial court upon such issue.

**5. Boundaries ⇐46(1)**

An agreement between adjoining landowners for the establishing of a boundary line may be express or implied.

**6. Boundaries ⇐42**

In suit to quiet title to realty claimed by adjoining property owners, finding of trial court that there was never an agreement fixing a boundary line between adjoining properties was a sufficiently broad finding on issue of whether or not any agreement had been made fixing a boundary.

**7. Adverse possession ⇐114(1)**

Evidence that defendant's predecessor in title employed plaintiff's predecessor in title to cultivate land in dispute, that at no time did plaintiff's predecessor in title perform any acts or do any work on the land which would indicate that he was claiming any interest adverse to defendant's predecessor in title, and that neither party paid all of taxes levied in any year against the realty, sustained finding that plaintiff was not entitled to realty by virtue of adverse possession.

**8. Quieting title ⇐54**

In suit to quiet title to realty to westerly 110 feet of two lots, wherein defendant disclamed any interest to 70 feet of such lots, the court, after plaintiff had failed to establish any title to any part of the lots other than that part disclaimed by defendant, properly awarded costs to defendant.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action to quiet title by A. W. Peake against Azusa Valley Savings Bank, a corporation. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Charles J. O'Connor and Donald S. Gillespie, both of San Bernardino, for appellant.

Tscharner & Miller, of Azusa, for respondent.

SCHOTTKY, Justice pro tem., delivered the opinion of the court.

In this action to quiet title the plaintiff appeals from a judgment in favor of defendant.

The action was instituted by appellant to quiet title to the westerly 110 feet of lots 3 and 4, block B, of subdivision No. 1, of the lands of Azusa Land and Water Company, as per map recorded in book 16, page 17, Miscellaneous Records of Los Angeles county.

He claims title to the westerly 110 feet of lots 3 and 4 by virtue of a deed executed by Frank L. Dingman and Nettie L. Dingman, his wife.

Appellant alleges in his second cause of action that prior to November 12, 1927, Frank L. Dingman and Nettie L. Dingman were the owners of all of lots 3 and 4 of the property in the above-described tract, which were planted to citrus fruits. On the 12th day of November, 1927, Frank L. Dingman and Nettie L. Dingman, husband and wife, duly executed a deed conveying to Herbert L. Thompson and Electa O. Thompson, husband and wife, as joint tenants, the last 660 feet of lots 3 and 4. It is also alleged that at the time of the execution of the last-mentioned deed the exact boundary line or survey line between said portion sold to the Thompsons and that portion of said lots 3 and 4 retained by the Dingmans was not known, nor were there any marks or monument to distinguish the boundary line between the contiguous portions or parcels of real property; that thereupon said adjoining landowners fixed and agreed upon a true boundary line; that under the terms of this agreement it was agreed that the true boundary line was midway between the sixth and seventh row of citrus trees on the westerly portion of said lots 3 and 4; that in pursuance to this understanding the Dingmans had complete control and possession of said six rows of citrus trees continuously from 1927 up to the spring of 1935; that during said period of eight years they did all things necessary for the care and cultural development of said property, and during said period of time from the year 1927 until the spring of 1935 they marketed and sold all citrus products grown upon the westerly 110 feet of lots 3 and 4, above described, and received all of the proceeds therefrom.

Respondent denied ownership in appellant of any of the disputed land and further alleged that for a long time prior to the commencement of this action they were the owners of this property and had been in possession thereof. Respondent bases its claim to title of the westerly 110 feet of lots 3 and 4 on the fact that Herbert L. Thompson and Electa O. Thompson on or about the 21st day of October, 1928, executed and delivered their promissory note and mortgage to the Azusa Valley Savings Bank, covering the easterly 660 feet of lots 3 and 4. Thereafter on the 17th day of March, 1933, respondent foreclosed said mortgage and obtained a decree of foreclosure and order of sale, and the property was by virtue of said decree of foreclosure sold to the Azusa Valley Savings Bank.

The distance from the west boundary line of lots 3 and 4 to the west boundary line of Azusa avenue is approximately 730 feet. Azusa avenue abuts said lots 3 and 4 on the east. In 1935 the Azusa Valley Savings Bank demanded possession of the easterly 40 feet of the westerly 110 feet of lots 3 and 4. This claim was based upon the contention that inasmuch as the original deed to the Thompsons conveyed the easterly 660 feet, and as the property was bounded by a highway, to-wit: Azusa avenue on the east, said highway being an 80-foot thoroughfare, and inasmuch as the easterly 40 feet of lots 3 and 4 had been dedicated for street purposes, that therefore the easterly boundary of the premises conveyed to the Thompsons and to which respondents subsequently purchased through foreclosure sale, was the westerly curb line of said Azusa avenue.

On the issues thus formed, a trial was had, resulting in findings of fact and conclusions of law to the effect that appellant was the owner of the westerly 70 feet of lots 3 and 4 and that respondent herein was the owner of the east 40 feet of the westerly 110 feet of lots 3 and 4, said easterly 40 feet being included within the 660 feet conveyed to H. L. Thompson and Electa O. Thompson. Costs were granted to respondent.

Appellant unsuccessfully presented a motion for new trial and after denial thereof this appeal was taken.

Appellant contends that the evidence is insufficient to justify the decision, and that the decision is against law, and in his briefs urges five points as ground for the reversal of the judgment of the court below. These points are: 1. That by the terms of the original deed from the Dingmans to the Thompsons no part of the westerly 110 feet of lots 3 and 4 was conveyed; 2. Appellant is the owner of the westerly 110 feet by virtue of an express agreement between the Dingmans and Thompsons fixing the boundary between the adjoining parcels

of real property; 3. The court failed to find on the material issue of whether an agreement could be implied from acts and conduct of the parties; 4. That said decision is against law by virtue of the doctrine of adverse possession; 5. The court was in error in refusing to grant costs to appellant. We shall discuss these points in the order of their statement.

[1, 2] 1. Appellant contends that the decision of the court below that respondent is the owner of the east 40 feet of the westerly 110 feet of lots 3 and 4 is contrary to law, claiming that the original deed from the Dingmans to the Thompsons conveyed no part of the west 110 feet of said lots 3 and 4. Said deed described the property conveyed to the Thompsons as "the easterly 660 feet of lots 3 and 4 in Block B of Subdivision 1 of the lands of Azusa Land & Water Company". The map of said tract shows that the easterly boundary of lots 3 and 4 was Azusa avenue.

Appellant contends that the true easterly boundary of the property conveyed to the Thompsons was the center line of Azusa avenue, and not the westerly line of said Azusa avenue, while respondent contends that the westerly line of Azusa avenue is the easterly boundary of the property conveyed to the Thompsons. Azusa avenue, as has heretofore been stated, is a thoroughfare 80 feet wide. If the contention of appellant is correct, he is the owner of the westerly 110 feet of said lots 3 and 4; while if the contention of respondent is correct, appellant is the owner of only the westerly 70 feet of said lots 3 and 4.

In support of his contention as to this point, appellant cites section 1112 of the Civil Code and the case of Anderson v. Citizens' Savings & Trust Company, 185 Cal. 386, 197 P. 113, 116.

Section 1112 of the Civil Code reads as follows: "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

The case of Anderson v. Citizens' Savings & Trust Company, supra, at first blush would seem to sustain the contention of appellant, but the question before the court in that case was as stated in the opinion itself, namely: "Did or did not that deed, describing the property as lot so and so in block so and so as shown by a certain map, operate to convey the land in front of the lot to the center of the streets shown on the map, although such streets had been abandoned as public streets?" Here the street along the property had not been abandoned.

In the case of Earl v. Dutour, 181 Cal. 58, 183 P. 438, 6 A.L.R. 1163, the plaintiff had a decree quieting his title to a strip of land 15 feet wide adjacent to the center line of lot 17 of the Hilliard tract, of which lot plaintiff and defendant owned respectively the easterly and westerly half. The question in dispute was whether the center line of the lot formed the boundary line of the strip of land in controversy, its solution depending upon the construction to be placed upon the word "lot" in the deed by which was conveyed to defendant the westerly one-half of lot 17 of the Hilliard tract. The map of Hilliard tract indicated that the westerly boundary of lot 17 was the center line of an avenue 60 feet in width. Plaintiff successfully contended in the trial court that the 30-foot strip covered by the avenue was part of the lot within the meaning of the deed, and that therefore the eastern boundary of the defendant's line was a line halfway between the center line of the avenue and the eastern boundary of lot 17. The Supreme Court rejected this contention, saying:

"However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word 'lot,' as generally and customarily used, does not include such portion of the street. Wegge v. Madler, 129 Wis. 412, 109 N.W. 223, 116 Am.St.Rep. 953. As stated by the Supreme Court of Indiana: 'Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term "lots," in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term "streets" means that portion set apart and designated for the use of the public and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended.' Montgomery v. Hines, 134 Ind. 221, 225, 33 N.E. 1100, 1101.

"In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word 'lot' was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy."

The case of Earl v. Dutour, supra, has been cited with approval in the following cases: Joens v. Baumbach, 193 Cal. 567, 226 P. 400; Hunter v. Roman Catholic Bishop, etc., 128 Cal.App. 90, 16 P.2d 1048; In re Dixon, 120 Cal.App. 635, 8 P.2d 881; Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950.

Appellant points out that Earl v. Dutour, supra, merely states that the facts there existing create a rebuttable presumption and its applicability depends upon the particular facts of each separate case. This rule the trial court did apply and we believe its finding is abundantly sustained by the law and the evidence.

[3, 4] 2. Appellant's second contention is that he is the owner of the westerly 110 feet by virtue of an express agreement between the Dingmans and the Thompsons, fixing the boundary line between the adjoining parcels of real property and that the findings of the trial court that there never was an agreement fixing a boundary line between the adjoining parcels of real property is against law, and is contrary to the evidence. There is no doubt that the law is well settled that where the boundary line between two adjoining owners is uncertain, they may agree upon a division line between them, which agreed line will then become the boundary line between their properties. In this case, however, there is a clear conflict in the evidence as to whether a boundary line was agreed upon, and we are bound by the finding of the trial court upon this issue.

[5, 6] 3. We are unable to find any merit in appellant's third contention to the effect that "the court failed to make any finding on the material question presented by the evidence whether an agreement could be inferred from the acts of the parties", and that the "trial court was in error in failing to find on this material issue, and that the acts and conduct of the parties was sufficient to imply that an agreement had been made fixing a boundary".

An agreement for the establishing of a boundary line may be express or implied, and the finding of the court below that there never was an agreement entered into between the Thompsons and the Dingmans fixing a boundary line between their adjoining properties was a sufficiently broad finding upon the issue of whether or not any agreement had been made fixing a boundary.

4. Appellant's fourth point is that the decision of the court that respondent is the owner of the easterly 40 feet of the west 110 feet is against law and is contrary to the evidence by virtue of the doctrine of adverse possession.

The trial court found as follows upon the issue of adverse possession:

"14. During the period from November 12, 1937, to about the Spring of 1933, Frank L. Dingman did the necessary work for the preservation, care, upkeep, and cultural development including irrigating, fumigating, pruning, fertilizing, etc., of the East 660 feet as defined in Findings 12 and 13, but said work and labor on the part of said Frank L. Dingman was done and performed by him for and in behalf of said Herbert L. Thompson and Electa O. Thompson and as their employee, for which work and for his labor and expense in the doing of the same, the said Dingman sent bills to the said Thompsons which bills the said Thompsons paid to said Dingman, all without any knowledge on the part of said Thompsons that the said Frank L. Dingman and Nettie L. Dingman were claiming said premises or any part thereof, and more particularly, without knowledge by the Thompsons that the Dingmans were claiming the East 40 feet of the West 110 feet of said Lots 3 and 4 in Block B of Subdivision No. 1 of lands of Azusa Land & Water Company, adversely to the said Herbert L. Thompson and Electa O. Thompson.

"Neither the said Frank L. Dingman or Nettie L. Dingman or either nor any of them, ever performed any act or did any work on said East 40 feet of the West 110 feet of said Lots 3 and 4 which would indicate to said Herbert L. Thompson or Electa O. Thompson or to the general public that the Dingmans were claiming the East 40 feet to the said West 110 feet of Lots 3 and 4 adversely to the said Thompsons or any other person.

"15. Said East 660 feet of Lots 3 and 4 * * * was during the years 1928,

1929, 1930, 1931 and 1932 assessed to Herbert L. Thompson by the City of Azusa, and the said Herbert L. Thompson paid the City taxes on said 10 acres during all of the years from 1928 to 1932 inclusive. For the years 1933, 1934 and 1935, the said lands were assessed by said City of Azusa to Azusa Valley Savings Bank, the defendant herein, and all City taxes on said lands during said years of 1933, 1934 and 1935, were paid by said Azusa Valley Savings Bank. That neither the plaintiff nor his predecessors, Frank L. Dingman and Nettie L. Dingman, paid all of the taxes levied in any year against the 40 foot strip of real property in dispute in this action.

"16. At the time of the transfer of said East 660 feet of said Lots 3 and 4 to Herbert L. Thompson and Electa O. Thompson by Frank L. Dingman and Nettie L. Dingman it was intended by said grantors to convey to the said Thompsons a full 10 acres of orange trees and the grantees Herbert L. Thompson and Electa O. Thompson accepted the transfer under the belief that they were receiving 10 acres of orange trees."

[7] We have read the entire record very carefully, and believe that there is a clear conflict in the evidence as to all of the issues raised by the appellant upon the question of adverse possession. The court below found that the appellant had not established title to the 40 feet in question by adverse possession and the record amply sustains such finding.

[8] 5. The final point urged by appellant is that the trial court was in error in refusing to grant costs to plaintiff and appellant. The trial court found that the defendant's answer amounted to a disclaimer of title to the westerly 70 feet of lots 3 and 4, and found against plaintiff's claim to any more of said lots than said westerly 70 feet. The trial court therefore concluded that the defendant was entitled to recover its costs of suit, which were thereafter taxed at $35.27.

Appellant by his complaint sought to quiet his title to the westerly 110 feet of lots 3 and 4. It is clear from defendant's answer that defendant made no claim to the westerly 70 feet of said lots. The easterly 40 feet of the westerly 110 feet was therefore the only property the title to which was in dispute, and the court below properly concluded that defendant's answer was a disclaimer of any interest in the said westerly 70 feet of said lots. The cause having proceeded to trial and plaintiff having failed to establish any title to any part of said lots 3 and 4 other than the westerly 70 feet, to which defendant asserted no claim, it is difficult to perceive upon what basis the court below would have been justified in granting costs to appellant.

In view of the foregoing, the judgment of the court below should be affirmed. It is so ordered.

We concur: PULLEN, P. J.; TUTTLE, J.

## PEOPLE v. LUCAS.*

Cr. 1717.

District Court of Appeal, Third District, California.

Feb. 21, 1940.

Hearing Granted March 21, 1940.

1. Infants ⇐20

Testimony of complaining witness was not required to be corroborated to sustain conviction for contributing to the delinquency of a minor.

2. Criminal law ⇐742(1)

Credibility of the witnesses is exclusively for the jury.

3. Criminal law ⇐775(2)

Where accused testified in support of alibi and jury was instructed that, to establish guilt, prosecution was required to prove all material allegations of offense beyond a reasonable doubt and to a moral certainty, and instruction charged that, before accused could be found guilty, jury was required to find that accused on or about a certain date in county of venue committed particular acts complained of, refusal to give instructions as to alibi was not error.

4. Criminal law ⇐768(1)

In prosecution for contributing to delinquency of a minor, court is not bound to give cautionary instructions.

5. Criminal law ⇐829(16)

Where jury were told that accused was presumed to be innocent, the meaning of a reasonable doubt was defined, and that they were not to act upon mere probabilities and were admonished to disregard fanciful theories and unreasonable inferences, refusal to give cautionary instructions in prosecution for contributing to delinquency of a minor was not error.

6. Infants ⇐20

Evidence sustained conviction of contributing to delinquency of a minor as against claim of alibi.

---

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Alvin Julius Lucas was convicted of contributing to the delinquency of a minor, and from the judgment of conviction and an order denying a motion for new trial, he appeals.

Judgment and order affirmed.

Robert B. Fowler, of Modesto, and A. G. Bailey, of Woodland, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The defendant was charged with contributing to the delinquency of a minor, a misdemeanor, and after a jury trial, was found guilty, and from the judgment thereon, and from an order denying a motion for a new trial, this appeal is taken.

As grounds for appeal it is contended that the testimony of the complaining witness was not sufficiently corroborated; that the court erred in refusing to give a proffered instruction dealing with the question of alibi, and in refusing to give a cautionary instruction, which appellant claims should have been given on account of the nature of the charge against him.

At the time of the alleged offense the complaining witness was a boy over fourteen, and at the time of the trial was past fifteen, and in the first year of high school. The record discloses no evidence of coaching of the witness nor any passion or prejudice on the part of the jurors, nor is the story of the boy so inherently improbable or incredible as to appear to be the result of imagination or fabrication.

The defendant admitted that he was frequently in Modesto where the crime is alleged to have taken place, and that he often stayed at the home of a Mrs. Robinson, and asserted that his wife usually spent the night with him at the Robinson home. Other witnesses, however, testified that Mrs. Lucas usually stayed with other friends while defendant spent the night alone at the Robinson home. It is rather significant, and a fact of which the jury could take notice, that the defendant, who was an ordained minister and holding services in Modesto, could not substantiate any of his testimony as to dates from any of his church records or calendar.

[1] The boy fixes one of the material dates in this case by the fact that on a particular Sunday evening he and appellant together saw the picture "Marie Antoinette". Appellant, while denying that he saw the particular picture with the boy, admitted having seen that picture and admitted that they had together gone to this show house and had seen at least one other picture, and that he had, on other occasions, given the complaining witness passes

*For subsequent opinion see 105 P.2d 102.

to the theater. It is also not denied that defendant had and used such an automobile as referred to by the complaining witness. It is to be remembered, however, that the testimony of the complaining witness is not required by the statute to be corroborated. People v. Raich, 26 Cal. App. 286, 146 P. 907.

[2] Appellant claims that on the particular day in question he was visiting at San Quentin prison, and therefore could not have been in Modesto. However, there is nothing in the record to show that appellant could not have been in San Quentin and still have reached Modesto by 8 o'clock in the evening of the day in question. It is upon that testimony appellant has based his defense of an alibi. Under these circumstances we cannot say that the refusal of the proffered instruction as to an alibi was error. No witness, other than the defendant, testified as to his whereabouts at the time of the alleged crime. It very probably was true that defendant was at San Quentin on the day in question, but still he could have been in Modesto at the time charged by the prosecution. There are certain contradictions in the testimony of the complaining witness, and some witnesses testified to facts somewhat at variance to the testimony of others, but the credibility of the witnesses is exclusively the province of the jury.

[3] The jury were instructed that it devolved upon the prosecution to prove all the material allegations of the offense beyond a reasonable doubt and to a moral certainty before they could find the defendant guilty. Among the allegations as recited in the instructions, and which the jury were charged to find to be true before the guilt of the defendant could be fixed, was that the defendant was, on or about the 25th day of September, 1938, in the county of Stanislaus, and did then and there commit the particular acts complained of. We find no error in the refusal to give the instruction as to an alibi.

[4, 5] As to the refusal to give a cautionary instruction it cannot be said that the omission to give such an instruction is always a ground for reversal. The court is not bound to give such an instruction. People v. Anthony, 185 Cal. 152, 196 P. 47. Here the jury were told that the defendant was presumed to be innocent; the meaning of a reasonable doubt was defined; that they were not to act upon mere probabilities, and were admonished to disregard fanciful theories and unreasonable inferences.

Nor do we find any misconduct on the part of the district attorney, either in his examination of the witnesses nor his address to the jury. As to the latter, the court instructed the jury that arguments of counsel were not to be considered as proving any fact in issue.

[6] An examination of the record before us reveals that appellant was ably represented and that the jury were, if they believed the evidence of the prosecution, fully justified in their verdict of guilty.

Finding no error sufficient to justify a reversal, the judgment and order are affirmed.

We concur: THOMPSON, J.; TUTTLE, J.




37 Cal.App.2d 415

## BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. McLAUGHLIN et al.

Civ. 11091.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1940.

Hearing Denied April 18, 1940.

**1. Appeal and error ⇐1208(1)**

Generally, a party is entitled to restitution after a reversal of a judgment if he has been deprived of property by virtue of the judgment or by virtue of process issued on the judgment.

**2. Appeal and error ⇐1208(2)**

The trial court has inherent power independent of any statute to order restitution after reversal of a judgment if a party has been deprived of property by virtue of the judgment or by virtue of process issued on the judgment.

**3. Appeal and error ⇐1208(10)**

Where, after reversal of a judgment, a person deprived of property by virtue of a judgment, or by virtue of process issued on the judgment, seeks restitution in a summary proceeding by way of motion made in the main action in either the appellate court

or trial court, no right of set-off exists. Code Civ.Proc. § 957.

**4. Appeal and error ⇐1208(7)**

Where, after reversal of a judgment, a party who has been deprived of property by virtue of a judgment, or by virtue of process issued on the judgment, seeks, in an independent action, restitution, such action is equitable in nature, and restitution may be denied where it would be inequitable to grant it; but, where restitution is sought in a summary proceeding, the matter rests in the sound discretion of the court. Code Civ. Proc. § 957.

**5. Appeal and error ⇐1208(1)**

In unlawful detainer action for possession of leased premises, where, pursuant to the lease, defendant had deposited in a warehouse part of the crop grown on the leased premises, and, pursuant to judgment in its favor below, plaintiff levied execution on the deposit, proceeds of which were paid to plaintiff, and thereafter judgment was reversed with directions to enter judgment in favor of defendant, defendant's motion for restitution of proceeds of execution sale was denied without an abuse of discretion, where defendant's right to reversal was predicated upon existence of the lease and defendant's compliance with the terms thereof by storing the crops in the warehouse in payment of the rental. Civ.Code, § 3521; Code Civ. Proc. § 957.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Unlawful detainer action by the Bank of America National Trust & Savings Association, a national banking association, against Patrick McLaughlin and others. From an order denying defendants' motion for restitution of proceeds of execution sale, defendants appeal.

Affirmed.

Wyckoff, Gardner & Parker, of Watsonville, Garth V. Lacey, of Salinas (Philip T. Boyle, of Watsonville, of counsel), for appellants.

Keyes & Erskine, of San Francisco, and Rosendale & Thomas, of Salinas (J. Benton Tulley, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

In this unlawful detainer action, the trial court entered judgment in favor of plaintiff. Thereafter defendants appealed but the execution of the judgment was not stayed. During the pendency of the appeal, certain property was sold under execution and plaintiff became the purchaser. The proceeds of the sale, amounting to approximately $3,100, were paid to plaintiff. Thereafter the judgment of the trial court was reversed with directions to enter judgment in favor of defendants. Bank of America v. McLaughlin, 22 Cal.App.2d 411, 71 P.2d 291, 72 P.2d 554. Defendants then made a motion for restitution of the proceeds of the execution sale. The trial court made its order denying said motion and defendants have appealed from said order.

The background of this litigation is fully set forth in Bank of America v. McLaughlin, supra. The first unlawful detainer action was brought by plaintiff against defendants in 1932. The present action was brought in 1933. In the first action defendants alleged in their answer that they had the right to possession by virtue of a seven-year oral lease entered into on December 1, 1931, and by virtue of their compliance with all the terms of said lease. They further alleged facts claimed to be sufficient to estop plaintiff from setting up the statute of frauds. The first action was tried by a jury and resulted in a judgment in favor of defendants. No appeal was taken and that judgment became final prior to the time that the present action was commenced. In the present action, defendants set up the same defenses and also alleged that the final judgment in the first action was a bar to the present action. The trial court found against the plea in bar and entered its judgment in favor of plaintiff. The appellate court held that said finding against the plea in bar was erroneous and reversed the judgment with directions. Bank of America v. McLaughlin, supra.

The material provisions of the lease alleged by defendants were that it was for a term of seven years commencing on December 1, 1931; that defendants were to plant crops on the tillable portion of the land and were to care for and to harvest said crops at their own expense; and that as rental, defendants were to deliver to plaintiff at the Southern Pacific Milling Company's warehouse at San Ardo one-fourth of the crops so produced.

In compliance with the terms of the alleged lease, defendants did store one-fourth of the crops produced each year in said

warehouse in the name of plaintiff and so notified plaintiff. In some instances, warehouse receipts were obtained and forwarded to plaintiff but as this litigation was pending between the parties, in which litigation plaintiff denied the existence of the alleged oral lease, plaintiff did not accept said receipts or deal in any manner with said crops except to cause them to be sold upon execution in 1936 during the pendency of the main appeal. The motion for restitution was directed at the proceeds of the sale of said crops so stored.

Defendants contend that the trial court erred in denying their motion for restitution but we find no merit in this contention. We have reached this conclusion after a review of the authorities dealing with the subject of restitution and a consideration of the peculiar circumstances presented to the trial court upon the motion for restitution in the instant case.

[1-4] It may be conceded that a party is ordinarily entitled to restitution after a reversal of a judgment if he has been deprived of property by virtue of said judgment or by virtue of process issued upon said judgment. Section 957 of the Code of Civil Procedure reads in part as follows: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed." It will be noted that the quoted portion of said section relates only to the power of the appellate court to order restitution but it has been held that the trial court has the power to order such restitution, which power is inherent and exists independently of any statute. Di Nola v. Allison, 143 Cal. 106, 113, 76 P. 976, 65 L.R.A. 419, 101 Am.St.Rep. 84; Ashton v. Heydenfeldt, 124 Cal. 14, 17, 56 P. 624. It may be further conceded that the authorities indicate that when restitution is sought in a summary proceeding by way of motion made in the main action in either the appellate court or the trial court, no right or set-off exists (Buckman v. Tucker, 9 Cal.2d 403, 406, 71 P.2d 69), but it has been consistently held in this jurisdiction that when such restitution is so sought in such summary proceeding in the main action, the moving party has no absolute right to an order for restitution but the granting or denying of the motion rests in the sound discretion of the court to which the motion is addressed. Hansen v. D'Artenay, 13 Cal.App.2d 293, 57 P.2d 202; Yndart v. Den, 125 Cal. 85, 57 P. 761; Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 P. 218; 2 Cal.Jur. 1001, sec. 592; see, also, 5 C.J.S., Appeal and Error, 1543, § 1980; 2 Am.Jur. 741, sec. 1243. It has been further indicated that even where restitution is sought in an independent action, such action is "equitable in nature", and that restitution may be denied where it would be inequitable to grant such restitution. Restatement, Restitution 305, sec. 74.

[5] It thus appears that the real question presented for determination on this appeal is whether the trial court abused its discretion in denying defendants' motion. We find no abuse of discretion in such denial. It appears entirely clear that the basis of the defense in the unlawful detainer actions was that defendants had a lease on the premises and had complied with the terms of that lease. The main appeal herein (Bank of America v. McLaughlin, supra) was decided upon the ground that the existence of the seven-year lease had been adjudicated in the first action and that the evidence showed that defendants had complied with the terms of said lease. In other words, defendants' right to a reversal on the main appeal was necessarily predicated upon the existence of the lease and defendants' compliance with the terms thereof by storing the crops in question in plaintiff's name in payment of the rental. We need not determine the claim of plaintiff that title to the crops so stored passed to plaintiff at the time of such storage by virtue of the provisions of sections 1502 and 1503 of the Civil Code, and that thereafter there could be no "property and rights lost" by defendants as the result of the sale of said crops under execution. Regardless of the question of title to the crops, it would obviously be inequitable to permit defendants to obtain a reversal of the judgment on the main appeal by reason of their alleged payment of the rental by the storage of the crops in plaintiff's name and then to permit defendants to obtain restitution of the proceeds of the sale of said crops by reason of said reversal of the judgment. Defendants took the benefit of their acts in storing said crops in plaintiff's name in payment of the rental and they must

bear the burden. Civ.Code, § 3521. Not only do we find no abuse of discretion in the denial by the trial court of defendants' motion, but we are of the view that it would have constituted an abuse of discretion to have granted the motion under the circumstances.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




37 Cal.App.2d 373

**PEOPLE v. MILES.**

**Cr. 393.**

District Court of Appeal, Fourth District, California.

Feb. 19, 1940.

As Modified Feb. 29, 1940.

**1. Criminal law ⇐1186(4)**
**False pretenses ⇐43(2)**

In prosecution for grand theft arising out of defendant allegedly obtaining money from State Relief Administration by false statements in application for relief, testimony of defendant's wife pertaining to her conversation with case worker of State Relief Administration when he called to verify information given by defendant, and testimony of defendant as to conversation with employee at State Relief Administration headquarters when he filled out application, were admissible for purpose of showing whether relief administrator relied upon written information given in application or upon other representations, or upon independent investigation of his own, in making relief payments, and exclusion of such testimony was prejudicial error. Pen.Code, § 484; Const. art. 6, § 4½.

**2. Criminal law ⇐27**

Even if obtaining relief checks totaling $235.67 from State Relief Administration as result of alleged false statements in written application for relief, in that answers in application conveyed impression that defendant was not presently employed, constituted but one theft as charged in information, the sum of $37.61, which represented payment after defendant had notified relief administration that he was employed, was deductible from principal sum of $235.67 charged in information, and would accordingly reduce amount obtained under claimed false representations to an amount less than $200 and would therefore at most constitute only a "misdemeanor." Pen.Code, §§ 484, 487, 488.

[Ed. Note.—For other definitions of "Misdemeanor," see Words & Phrases.]

**3. Indictment and Information ⇐130**

Under charge of theft in obtaining money by false pretenses where property was taken at different times and was different in character and value, even though obtained upon same false representation, separate crimes have been committed and are completed on the day when defendant takes possession of and appropriates the property described.

**4. False pretenses ⇐12**

The intent to obtain property by false or fraudulent means is shown by plan devised by person contemplating the offense, but the crime is not complete until such person obtains possession of property of the other as result of fraudulent representations.

**5. Criminal law ⇐27**

That defendant allegedly obtained several relief checks totaling $235.67 from State Relief Administration by false statements in written application for relief, in that answers in application conveyed impression that defendant was not presently employed, as alleged in information charging grand theft, would not constitute but one theft so as to authorize prosecution as for a felony. Pen.Code, § 484.

**6. False pretenses ⇐22, 54**

Partial restitution or an agreement to reimburse is not ground of defense in prosecution for grand theft, but only authorizes court to mitigate punishment in its discretion. Pen.Code, § 484.

**7. Criminal law ⇐1023(8)**

An order denying motion in arrest of judgment is not appealable.

---

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Carmi D. Miles was convicted of grand theft, and he appeals.

Reversed. Appeal from order denying motion in arrest of judgment dismissed.

Charles J. O'Connor, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant in this action was prosecuted by the district attorney of San Bernardino county on an information filed July 10, 1939, charging grand theft under section 484 of the Penal Code, as follows: that on the 26th day of January, 1937, in the said county of San Bernardino, state of California, he did "wilfully, unlawfully and feloniously take the personal property of the State of California, to-wit: the sum of $235.67 * * *". After a plea of not guilty and a trial by a jury, a verdict of guilty with recommendation for leniency was rendered. A motion for new trial was ordered denied, as was a motion in arrest of judgment. Application for probation was denied and appellant was thereafter sentenced to the state prison. Appellant has appealed from the above-mentioned orders and from the judgment of conviction.

Stripped of unnecessary minutiae, the facts may be thus summarized: Appellant, on January 26, 1937, went to the office of the State Relief Administration of California and filed his application for relief. At that time he was the head of a family consisting of himself, his wife and six children. He was purchasing a home, with an indebtness of $2,300 against it. Due to loss of employment at various times over a period of years, he was indebted for doctor bills and grocery bills. His skill as a wage earner was in the operation of a steam shovel. This employment paid a high hourly rate. He was attached to a contracting firm and when it had work needing his skill he was employed for the number of hours, days or weeks it required to complete the task. Then he was unemployed until his employer secured some new contract.

The application form consisted of a number of printed statements of facts with blanks to be filled in by the applicant. Among them, the following are challenged as to their accuracy. First, "The name of my employer for whom I worked longest is—*Geo. Herz & Co.*" Second, "I have been unemployed since—*Dec. 1936.*" Third, "I am employable at this time—*Yes.*" The part italicized contains the information furnished by the appellant. Appellant talked to an employee at the State Relief Administration headquarters and presented the application and signed it in the presence of a Mrs. Hazel Elliott, who read over each of the statements contained in the entire application and had the application signed in her presence and she signed as a witness.

The claim of false pretense was that the answers conveyed the impression that appellant was not presently employed by Geo. Herz & Co.; that appellant was not employed during January, 1937; that appellant was employable on the date of the application. After the filing of the application for relief appellant received from the State Relief Administration for the period from January 26, 1937, until April 20, 1937, the sum of $235.67, which was paid on the dates and in the amounts as follows: February 15, 1937, $47.31; February 15, 1937, $2.81; February 19, 1937, $35.11; March 2, 1937, $37.61; March 7, 1937, $37.61; April 2, 1937, $37.61; and on April 17, 1937, $37.61.

For a period of time, approximately five years, prior to the date of the criminal charges herein involved, appellant was employed off and on as a shovel operator, and during said period of time and at the time he made his application for unemployment relief, he was receiving a government pension in the sum of $10 per month. The evidence further shows that appellant had been paid by Herz & Co. for labor performed during the month of January, 1937, the sum of $80.49; for the month of February, $95.66; for the month of March, $129.34; and for the month of April, $198.42, making a total of $503.91, in addition to the pension of $10 per month.

According to the evidence in the record, appellant did not personally report to the State Relief Administration the fact that he was part time gainfully employed in private industry until he called for his check either "the last one" or "next to the last one", when he notified the paymaster's office that he was working pretty steady and that he "may not be entitled to the check". He testified that they answered him that "if it wasn't mine it would not be made out to me". This testimony stands uncontradicted in the record.

[1] Appellant testified that at the time the application was filed he was told by the recipient of the application that there would be further investigation of the representations made and that he would be called upon by a home worker and case aid; that thereafter a Mr. Melvyn, a case aid, called; that appellant did not talk to him but his wife did. Mrs. Miles, on the witness stand, was asked to detail the conversation with Mr. Melvyn. An objection by the district attorney to this conversation was sustained by the trial court. Appellant thereafter made an offer to prove that his wife told Mr. Melvyn of the sickness of their two children, of her husband's illness and hospitalization, of the expenses of that illness amounting to more than $300; *that she told Mr. Melvyn that her husband was working; that he had part time employment, but that the amount received from his employment was not nearly enough to support them;* that she had supplemented the amount of their earnings by working as a chambermaid in the hospital to help pay the bills incurred there. The objection to the offer of proof was sustained. The portions italicized were clearly admissible. She did later testify, however, that Mr. Melvyn discussed the matter of her husband's employment with her and that he replied that he was glad her husband had part time employment; that if her husband got steady employment to let him know, which she said she did. Mr. Melvyn, although in court, did not deny this statement. A like offer of proof was made by appellant that he had talked with an intake officer of the commission at the time he filed the application; that he told her that he was having part time employment but that the amount received was not sufficient to support his family and pay their bills. The evidence as to what appellant said to her was ruled inadmissible, and that which Mrs. Elliott, the intake officer, said to appellant respecting his employment when she took the original application was held admissible. This entire conversation was clearly admissible. However, appellant was later permitted to testify that at the time the application was filled out Mrs. Elliott explained to him that even though he was working part time he was still eligible for relief. On rebuttal she denied that she had made any such statement. Mrs. Elliott further testified that she stated to Mr. Miles that "if at any time his condition would change that that would be his responsibility to explain the change"; that she meant by *his condition* that "if he received more than he stated at the time of the application or if he became more in need, for additional members of the family, any change in the condition that he had stated was his, that he would have to explain that, that was his responsibility to notify us".

It is therefore quite apparent that the testimony of Mrs. Miles pertaining to her conversation with Mr. Melvyn when he called to verify the information given by appellant, wherein he was informed that her husband was working part time, was admissible for the purpose of showing whether the relief administrator relied upon the written information given in the application or upon other representations or upon independent investigation of his own, in making the payments above mentioned. People v. Daniels, 64 Cal.App. 514, 222 P. 387; People v. Ward, 145 Cal. 736, 79 P. 448; People v. Hong Quin Moon, 92 Cal. 41, 27 P. 1096; People v. Steffner, 67 Cal.App. 1, 13, 227 P. 690; State v. Bingham, 51 Wash. 616, 99 P. 735; People v. Talbot, 220 Cal. 3, 28 P. 2d 1057.

This same rule applies to the conversation claimed to have taken place between appellant and Mrs. Elliott at the time the application was made, and particularly so where appellant was charged under section 484 of the Penal Code, rather than under section 530a of the Penal Code. Great latitude should have been allowed in admitting the entire conversation giving rise to the claimed false statements. It was therefore error for the trial court to refuse to admit this evidence. The evidence is uncontradicted that appellant notified the relief administration before the last payment of $37.61 was appropriated by him, that he was at least part time employed.

[2] Assuming but not holding, according to respondent's argument, that the transaction comprised successive acts of taking under a single felonious impulse and that it therefore constituted but one theft, the uncontradicted evidence indicates that the sum of $37.61, the last payment, was deductible from the principal sum of $235.67 charged in the information, if it was obtained after appellant had duly notified the relief administration that he was employed. If after such notice he was allowed to appropriate this sum of

$37.61 under a new and different representation it would accordingly reduce the amount obtained under the claimed original false representation to an amount less than $200 and would therefore constitute only a misdemeanor. Secs. 487 and 488, Pen.Code.

[3] The authorities of this state hold that under the charge of theft in obtaining money by false pretenses, where the property was taken at different times and was different in character and value, even though obtained upon the same false representation, separate crimes have been committed and are completed on the days when the defendant takes possession of and appropriates the property described. People v. Rabe, 202 Cal. 409, 261 P. 303; People v. Ellison, 26 Cal.App.2d 496, 79 P.2d 732; People v. Coyle, 134 Cal.App. 612, 25 P.2d 991.

[4] In People v. Rabe, supra, which cannot be distinguished from the instant case, it was said [202 Cal. 409, 261 P. 305]: "The intent to obtain property by false or fraudulent means is shown by the plan devised by the person contemplating the offense, but the crime is not complete until such person obtains possession of the property of the other as a result of fraudulent representations. In other words, the crime is accomplished when an accused receives into his possession property which he had planned to fraudulently gain. So in the instant case, while a general intent to defraud may have been formed in the mind of the accused at the time of or before he completed the first offense, the other crimes charged were completed as separate and distinct offenses on the days that he unlawfully took possession of the property described in the several counts of the indictment. If appellant's theory be correct and the value of the property first acquired had been under $200, the appellant could have been put to his trial for a misdemeanor only, and other subsequent offenses would have been merged into the misdemeanor prosecution. * * It is the act of getting possession of or of obtaining property by false and fraudulent representations which the law punishes as a crime."

In People v. Ellison, supra, it was held [26 Cal.App.2d 496, 79 P.2d 733]: "The obtaining of three sums on different dates constituted three separate acts. The fact that the three sums were obtained from the same party and on the same representations does not reduce the three separate acts to one act. Appellant had the fraudulent intent to obtain property by false representations, and the obtaining of the property on the first occasion under the inducement of false representations constituted a complete crime. When at a later date other property was obtained under the influence of the fraudulent representations which had earlier been made a separate offense was committed."

[5] It cannot therefore be said, considering the evidence erroneously excluded and the facts related, that the instant case comes within the rule laid down and as applied to the facts in the case of People v. Dillon, 1 Cal.App.2d 224, 36 P.2d 416; People v. Bratton, 125 Cal.App. 337, 14 P.2d 125; and People v. Sing, 42 Cal. App. 385, 183 P. 865, to the effect that a transaction comprising successive acts of taking under a single felonious impulse constitutes but one theft.

We are impelled to hold that under the circumstances the errors complained of were prejudicial and that the appellant was erroneously convicted of a felony under section 484 of the Penal Code and that section 4½, article VI of the Constitution is not applicable.

[6] Incidentally, although partial restitution or an agreement to reimburse is not a ground of defense but only authorizes the court to mitigate punishment in its discretion, it appears from the record that appellant received a letter from the Department of Finance at Sacramento dated May 31, 1939, stating that a "balance of $212.53 was owed by you on account of certain relief overpayments". It also appears from the record that in May, 1937, appellant signed an agreement to repay this amount at the rate of $15 a month, and it further shows that $25 was subsequently repaid to the state by appellant and such payments were made prior to the filing of the information. Sec. 513, Penal Code; People v. Hand, 127 Cal. App. 484, 16 P.2d 156.

[7] The order denying the motion in arrest of judgment not being appealable, is dismissed. People v. Pettinger, 94 Cal. App. 297, 271 P. 132; People v. Martin, 188 Cal. 281, 205 P. 121, 21 A.L.R. 1399. Respondent's motion for diminution of the record is granted and the re-

porter's transcript is corrected accordingly. For the reasons stated, the order denying appellant's motion for new trial and the judgment from which this appeal has been perfected are reversed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 428

## GILLEN v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11082.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1940.

**1. Contempt ⇐66(7)**

Upon review of judgment for direct contempt of court, language used must be considered in connection with all surrounding circumstances, and unless the language, as a matter of law, could be construed only as being not contemptuous, Court of Appeal may not hold that trial court exceeded its jurisdiction in adjudging the language contemptuous.

**2. Contempt ⇐10**

Where deputy district attorney during preliminary hearings before municipal court stated his mind was to file an affidavit of prejudice and, in answer to remark of opposing counsel that deputy had lost his cases and would lose every time, stated, "You won before you started," whereupon deputy was adjudged in contempt of court, Court of Appeal could not say as a matter of law that the language was not contemptuous.

**3. Contempt ⇐63(4)**

An order reciting the facts was necessary for a judgment of contempt, and in framing such order court could set forth the tone and manner in which the words were uttered and the position from which the contemner uttered the objectionable language. Code Civ.Proc. § 1211.

**4. Contempt ⇐63(1)**

Statement of trial court, immediately after contemptuous language was uttered, that attorney was guilty of contempt and was fined $50, was not the court's "judgment of contempt," but contempt proceedings were properly continued to future date, and subsequent order reciting the facts as required by statute was the final judgment determining contemner's rights. Code Civ.Proc. § 1211.

---

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Proceeding upon writ of review by Leslie C. Gillen against the Municipal Court of the City and County of San Francisco, State of California, and others, to review judgment of that court holding petitioner guilty of contempt of court. From a judgment of the Superior Court annulling the judgment for contempt in part and affirming in part, petitioner appeals.

Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

Melvin M. Belli, J. W. Ehrlich, and M. Mitchell Bourqin, all of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner, a deputy district attorney, while attending the preliminary hearings set in the defendant court was adjudged guilty of contempt of court. He applied for and was granted a writ of review. That proceeding was heard in the superior court. From the judgment rendered in the latter court the petitioner appealed and has brought up typewritten transcripts.

On the 10th day of March, 1938, Honorable Twain Michelsen was the duly elected, qualified and acting judge of Department Ten of the Municipal Court of the City and County of San Francisco. On that date there had just been concluded certain criminal proceedings against Peter McDonough and Thomas McDonough. On that date there were also pending in said court other criminal proceedings involving the same defendants, which were ready for further proceedings. The petitioner was present as the representative of the office of the district attorney. Charles H. Brennan, Esq., an attorney at law, was present representing the defendants. Mr. Bren-

nan asked an immediate hearing. Thereupon the following occurred:

"Mr. Brennan: There are just two defendants that are charged with misdemeanors, and I am informed by Mr. Burke they are Peter McDonough and Thomas McDonough, and four charges against each. We will ask an immediate hearing on those charges, and we are ready to proceed to trial at whatever time will be convenient for the Court.

"The Court: What is your pleasure?

"Mr. Brennan: I don't know what the present mind of the District Attorney is.

"Mr. Gillen: My mind would be to file an affidavit of prejudice at once.

"Mr. Brennan: This is not the time to do that. If you are talking for publicity purposes, I am going to talk myself. You have been trying your cases in the Press for two years, and you have been vilifying every person who opposed you. You have been licked and you will be licked, every time you start.

"Mr. Gillen: You won before you started.

"The Court: For that remark, I adjudge you guilty of contempt of court, and fine you $50. You are not going to impugn the integrity of this Court.

"Mr. Gillen: I expected that."

Two continuances were had. On March 15, 1938, the trial court prepared and signed a formal order. After certain recitals said order ended with paragraphs worded as follows:

"Now therefore, be it ordered and adjudged by this Court, that the said Leslie C. Gillen by reason of said acts, conduct and statements, was and is guilty of contempt of the authority of this Court, committed in its presence on this 10th day of March, 1938.

"And it is further ordered, that the said Leslie C. Gillen be punished for said contempt, and that he is hereby fined the sum of Fifty Dollars, and that he pay said sum of Fifty Dollars to the Clerk of this Court, (and that in default of the payment of said fine he be imprisoned in the County Jail of the City and County of San Francisco, State of California until the said fine is paid, such imprisonment not to exceed one day for each and every Two Dollars of said fine that shall so remain unpaid or shall remain unsatisfied)." (Parentheses ours.)

On March 17, 1938, a writ of review issued out of the superior court at the request of the petitioner, directing the defendants to certify up the record. In due time said order was complied with, a hearing was had, and the judgment appealed from was thereafter rendered. That judgment annulled that portion of the judgment theretofore rendered in said department nine of said municipal court by said Honorable Twain Michelsen, the judge presiding therein, which we have enclosed in parentheses, and the rest of the said judgment was affirmed. From the portion affirmed the petitioner appealed.

[1, 2] He asserts the judgment rendered by the judge of the municipal court was void. In that connection, he makes no claim that the above-mentioned criminal proceedings were not regularly pending in said municipal court nor that the said court did not have jurisdiction of said proceedings. But he claims the above-mentioned judgment rendered in said court, as modified by the above-mentioned judgment of the superior court, was void because the facts showed no contempt. In this connection he asserts: "In determining the sufficiency of evidence to sustain an adjudication of contempt or the sufficiency of facts set forth in an affidavit or commitment for contempt, the same must be judged by the rules applied to criminal actions. As no intendments or presumptions can be indulged in favor of the adjudication, if the facts lead to two rational conclusions, one pointing to guilt and the other to innocence, the conclusion of innocence must prevail." Petitioner cites and relies on Hotaling v. Superior Court, 191 Cal. 501, 505, 217 P. 73, 29 A.L.R. 127, In re Roth, 3 Cal.App.2d 226, 229, 39 P. 2d 490; and In re Buckley, 69 Cal. 1, 13, 10 P. 69. Each of those cases involved a constructive contempt. The present case involves a direct contempt. Those cases are not in point. Petitioner also cites and relies on In re Roberts, 2 Cal.App.2d 70, 72, 37 P.2d 477, and Curran v. Superior Court, 72 Cal.App. 258, 267, 236 P. 975. Neither case presented a record showing the use of such language as was used in the present case. The petitioner claims the language used by him was susceptible of a construction showing the meaning was not contemptuous. However, it is clear said municipal court had jurisdiction of the proceedings pending before it. It also had jurisdiction to determine what was or was not contemptuous language. Unless we can say,

as a matter of law, that said language was susceptible of that construction only, for which the petitioner now contends, we may not say the trial court exceeded its jurisdiction. As we have shown below the language used by the petitioner is to be considered in connection with all of the surrounding circumstances. Having read the record with due care we are unable to say, as a matter of law, that the trial court did not properly construe the language used by petitioner.

[3, 4] The petitioner also contends the words spoken from the bench, "For that remark, I adjudge you guilty of contempt of court and fine you $50. You are not going to impugn the integrity of the court," constitute the judgment of the trial court and the whole thereof. Such is not the law. On the happening of the event it was appropriate that the court should have stated, "You are guilty of contempt." But the contempt proceeding could have been, and was, legally continued to a future date. To constitute a judgment of contempt it was necessary that the court should make an order reciting the facts. Code Civ.Proc. § 1211. In framing that order it was entirely proper to set forth the tone and manner in which the words were uttered and the position from which the contemner uttered the objectionable language. In re Hallinan, 126 Cal.App. 121, 14 P.2d 797. That order was not filed until March 10, 1938. It was the judgment to be enforced, if not annulled or appealed from, and which determined the rights of the petitioner. Rose v. Superior Court, 140 Cal.App. 418, 422–427, 35 P.2d 605.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




37 Cal.App.2d 334

**ANDRE v. STILSON et al.**

Civ. 11328.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1940.

Hearing Denied April 15, 1940.

**1. Limitation of actions ⇐148(1)**

A letter written by mortgagor's grantee before statute of limitations barred action to foreclose mortgage and within four years of bringing of action to foreclose mortgage, inquiring whether mortgagee would consider renewing mortgage, and accompanied by payment of interest, was sufficient "acknowledgment" to toll four-year statute of limitations as to grantee. Code Civ.Proc. §§ 337, 360.

[Ed. Note.—For other definitions of "Acknowledge; Acknowledgment," see Words & Phrases.]

**2. Limitation of actions ⇐149(1), 151(4)**

A letter signed by both mortgagee and mortgagor's grantee, and written before statute of limitations barred action to foreclose mortgage, and extending time of payment of mortgage for one year, and permitting grantee to pay balance due within such year, unconditionally continued existence of mortgage debt, and tolled statute of limitations and permitted bringing of foreclosure action within four years after signing of letter or within four years after extended due date. Code Civ.Proc. §§ 337, 360.

**3. Limitation of actions ⇐143(6)**

An action to foreclose mortgage was not barred by limitations as to successor in interest of mortgagor's grantee, where action to foreclose was not barred as to grantee, by reason of grantee's acknowledgment of promise in writing made while grantee was owner of mortgaged property. Code Civ.Proc. § 337.

**4. Mortgages ⇐559(3)**

In mortgage foreclosure action against mortgagor's grantee and successor in interest of grantee, rendition of personal judgment against grantee was not error, where grantee assumed and agreed to pay mortgage.

**5. Mortgages ⇐280(3)**

The promise of purchaser of mortgaged property to pay mortgage need not appear in deed, but obligation may be made orally or in separate instrument, or may be implied from transaction, or shown by circumstances under which purchase was made.

**6. Mortgages ⇐459(4)**

In action to foreclose mortgage, that complaint alleged only extension agreement executed by mortgagor, while proof included such extension agreement together with correspondence with mortgagor's grantee concerning an extension, was not a "material variance" warranting a reversal, where mortgagor and mortgagor's grantee were not misled in presenting their defense.

[Ed. Note.—For other definitions of "Material Variance," see Words & Phrases.]

**7. Appeal and error ⇐197(1)**

A claim of variance first raised upon appeal, without objecting in trial court to evidence alleged to have been at variance with the pleadings, came too late.

**8. Mortgages ⇐578**

In action to foreclose mortgage, alleged error in admission of letter written by successor in interest of mortgagor's grantee allegedly acknowledging mortgage indebtedness of successor was not prejudicial, where personal judgment was not entered against successor and mortgagee was entitled to foreclosure of mortgage against successor without regard to any alleged acknowledgment of indebtedness by successor.

---

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action to foreclose mortgage by F. Lewis Andre, as executor of the estate of Charlotte Canty, deceased, substituted in place and stead of Charlotte Canty, deceased, against Madeline F. Stilson, Georgette A. Beckjord, also known as Georgette A. Moore, and Jesse G. Beckjord, and others. From the judgment, Georgette A. Beckjord, also known as Georgette A. Moore, and Jesse G. Beckjord appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Burr & Smith, of Los Angeles (A. J. Cathcart, of Los Angeles, of counsel), for respondent.

SPENCE, Justice.

This action was brought to foreclose a mortgage executed by defendant Madeline F. Stilson in 1925. In 1926 defendant Stilson conveyed the property to her daughter, defendant Georgette A. Beckjord, also known as Georgette A. Moore, who will be hereinafter referred to as defendant Moore. In 1932 defendant Moore conveyed the property to defendant Jesse G. Beckjord, who will be hereinafter referred to as defendant Beckjord. Defendants Moore and Beckjord thereafter married. Defendants interposed the plea of the statute of limitations (Code Civ.Proc. § 337). The trial court found against said plea and entered judgment decreeing foreclosure of said mortgage and the personal liability of defendants Stilson and Moore for any deficiency. Defendants Moore and Beckjord appeal from said judgment.

All questions raised on this appeal relate either directly or indirectly to the plea of the statute of limitations. The note and mortgage were dated October 28, 1925. The note was in the sum of $3,000 and said note provided for payment of the principal "on or before three years after date". The note therefore matured on October 28, 1928, and an action to foreclose the mortgage would normally have been barred unless commenced within four years after October 28, 1928. The complaint herein was filed on April 19, 1935. Plaintiff relied upon certain agreements and certain correspondence with defendants to defeat the plea of the statute of limitations.

Defendants first contend that "the mortgage and note were outlawed as to defendants Moore and Beckjord and it was error to render judgment against them for foreclosure thereof". We find no merit in this contention.

We will first consider said contention with relation to defendant Moore and we will confine our discussion to certain correspondence had by plaintiff with defendant Moore in 1931 and after April 19 of that year. Such correspondence was had before the statute of limitations could have barred the action on the original obligation and was had within four years of the filing of the complaint herein. While we find sufficient acknowledgments of the indebtedness in several letters of the defendant Moore written during that period, we may rest our conclusions upon a letter written by said defendant on July 25, 1931, and upon a letter written by plaintiff to said defendant on November 4, 1931, which last mentioned letter was signed as accepted by defendant Moore. The subject matter of most of the correspondence was the payment of interest and the views of the parties regarding possible renewal or extension. In the course of the correspondence, a dispute arose as to whether any suggested renewal should take the form of a mortgage or a deed of trust. It would serve no useful purpose to set forth all of the correspondence as the letters dated July 25, 1931, and November 4, 1931, are sufficient.

[1] Under date of July 25, 1931, defendant Moore wrote and signed a letter reading as follows: "Dear Miss Canty

Enclosed please find check for interest on mtg., note. Would you consider renewing this mortgage for one more year? An early reply will be appreciated. Yours truly, (Signed) G. A. Moore." This letter alone constituted a sufficient acknowledgment within the meaning of section 360 of the Code of Civil Procedure and was sufficient to defeat the plea of the statute of limitations as to said defendant. It was accompanied by a payment of interest and it constituted as distinct an admission of the existence of the indebtedness as did the letter under consideration in Fielding v. Iler, 39 Cal.App. 559, 179 P. 519. In that case the court said at page 562 of 39 Cal. App., at page 520 of 179 P., "The letter above set forth contains admission of the existence of the mortgage indebtedness. For that reason it was a sufficient acknowledgment to toll the statute of limitations as to the appellant Josephine V. Anderson. Concannon v. Smith, 134 Cal. 14, 66 P. 40; Foster v. Bowles, 138 Cal. 346, 351, 71 P. 494, 495 [649]; Worth v. Worth, 155 Cal. 599, 102 P. 663; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145." Here, as in the Fielding case, defendant relies on Rodgers v. Byers, 127 Cal. 528, 60 P. 42, but the court further said in the Fielding case on page 562 of 39 Cal.App., on page 520 of 179 P., "In our opinion this letter meets the test laid down by the above cases, and is not a conditional promise within the rule of Rodgers v. Byers, 127 Cal. 528, 60 P. 42, as claimed by appellants."

Under date of November 4, 1931, plaintiff wrote defendant Moore as follows and defendant Moore signed an acceptance as indicated: "My dear Mrs. Moore: Confirming our verbal understanding as to the note for $3000.00 due October 28, 1931, and secured by a mortgage on Lot 11, Block 1, Shakespeare Beach: I agree to accept the sum of $1000.00 as payment on the principal, and will not press collection of the balance of said principal within a year from the date said note and mortgage were due. The entire balance of said principal ($2000.00) or any part thereof may be paid by you within the year. Interest at seven per cent to be paid quarterly as heretofore. Very truly yours, (Signed) Charlotte Canty. The above is hereby accepted (Signed) Georgette A. Moore."

[2] It thus appears that the parties finally agreed upon an extension rather than a renewal and that they intended that this letter, signed by both parties, should evidence their agreement. Thereafter said defendant paid the sum of $1,000 on account of principal and plaintiff did not "press collection of the balance" until April 19, 1935, when this action was commenced.

We are at a loss to understand the claim that the letter of November 4, 1931, was insufficient to defeat the plea of the statute of limitations as to defendant Moore. By the signed acceptance of the terms of that letter, defendant Moore clearly admitted the continued existence of the indebtedness. This alone would permit the bringing of the action at any time within four years after the signing of said acceptance. But if the signed acceptance of the terms of that letter completed a valid agreement for an extension of one year as was obivously intended by the parties, said defendant is in no better position with respect to her plea of the statute of limitations as the effect of such extension would be to permit plaintiff to file her action at any time within four years after the extended due date. We find nothing conditional about the acknowledgment of the indebtedness or the promise to pay the same within the rule of Rodgers v. Byers, supra. The last portion of the letter merely gave to said defendant the option of paying the entire balance of the principal sum or any part thereof prior to the extended due date. We are therefore of the opinion that this letter, signed and accepted by defendant Moore, was sufficient to defeat her plea of the statute of limitations.

[3] We may now briefly consider the above-mentioned contention with relation to defendant Beckjord. No extended discussion is required as no personal judgment was entered against said defendant Beckjord. It appears well settled that if the action to foreclose the mortgage was not barred as to defendant Moore by reason of her acknowledgment or promise in writing made while she was the owner of the property, then the action was not barred as to defendant Beckjord who was the successor in interest of said defendant Moore. Union Title Insurance Co. v. Maytag Co., 2 Cal.App.2d 48, 37 P.2d 512; Wood v. Willey, 136 Cal.App. 197, 28 P.2d 367; Lent v. Morrill, 25 Cal. 492; 16 Cal.Jur. 592. In view of the conclusions heretofore expressed we are of the opinion that the action to foreclose the mortgage was not barred as to either of said defendants.

[4, 5] Defendants further contend that "the court erred in rendering a personal judgment against Moore". The trial court found that defendant Stilson conveyed the property to defendant Moore in 1926 and that defendant Moore "assumed and agreed to pay the note and mortgage on the aforesaid property". In our opinion, there was ample evidence to sustain this finding and there was therefore no error in rendering a personal judgment against said defendant. While no mention was made of the mortgage in the deed to defendant Moore, it was not necessary that the agreement to assume the mortgage should appear therein. As was said in Hibernia Savings & Loan Society v. Dickinson, 167 Cal. 616, at page 621, 140 P. 265, at page 268, "It is not necessary that the promise to pay the mortgage should appear in the deed, or in writing. 'The obligation may be made orally or in a separate instrument; it may be implied from the transaction of the parties; or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement.' Hopkins v. Warner, 109 Cal. 133, 41 P. 868."

Defendants further contend that "there is a fatal variance between pleading and proof". This contention is based upon the following facts: In 1928 and about two years after defendant Stilson had conveyed the property to defendant Moore, said defendant Stilson and plaintiff executed a written instrument purporting to extend the time for payment of the principal sum to October 28, 1931. It will be noted that it was assumed by plaintiff and defendant Moore in the letter of November 4, 1931, that the principal had not become due until October 28, 1931, as provided in the extension agreement executed by plaintiff and defendant Stilson. In said extension agreement it was recited that defendant Stilson was "now the owner" of the property and it was thereinafter agreed that if she was not then the owner, the agreement for extension should be without any effect. When plaintiff filed her complaint, she alleged the execution of the note, mortgage and extension agreement by defendant Stilson, apparently assuming the correctness of defendant Stilson's representation that she was the owner of the property at the time of the execution of said extension agreement in 1928. It appeared upon the trial that defendant Stilson was not the owner of the property at the time she executed said extension agreement. The recitals in the findings show that defendant Moore later appeared in the action by her counsel, waived service of summons and stipulated in open court that she "be substituted for defendant Jane Doe named as a defendant in this action, and that all evidence heretofore introduced on the trial of said cause should be admitted as to her on the decision of this case". The clerk's transcript contains a written stipulation signed by defendant Moore waiving notice of trial, consenting that the issues be submitted forthwith on the "evidence adduced heretofore on the trial" and waiving notice of further proceedings. The evidence previously adduced on the trial included all of said correspondence with defendant Moore, which evidence was admitted without objection on the part of any of the defendants. The claim of variance is apparently based upon the fact that the complaint alleged only the extension agreement executed by defendant Stilson while the proof included said extension agreement together with the above-mentioned correspondence with defendant Moore.

[6, 7] Such variance is not a material variance warranting a reversal as it does not appear that defendants were misled in presenting their defense. Murnane v. Le Mesnager, 207 Cal. 485, 279 P. 800. Furthermore, defendants first raised the claim of variance upon this appeal without having objected in the trial court to the evidence alleged to have been at variance with the pleadings. It appears settled that their claim of variance comes too late. Thompson v. M., K. & T. Oil Co., 5 Cal.App.2d 117, 42 P.2d 374; McDougald v. Hulet, 132 Cal. 154, 64 P. 278.

[8] The final contention of defendants is that "it was error to admit over objection evidence of an alleged acknowledgment or new promise by Beckjord (Exhibit 8)". This objection relates to a letter written by defendant Beckjord to plaintiff in 1933, in which letter he referred to an enclosed check to cover interest and a payment of $100 on the principal. We need not discuss the question of error, for the error, if any, could not have been prejudicial. No personal judgment was entered against defendant Beckjord and, in view of the conclusions above reached, plaintiff was entitled to a judgment decreeing foreclosure of the mortgage against any successor in

interest of defendant Moore without regard to any alleged acknowledgment of the indebtedness by such successor.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




37 Cal.App.2d 371

**DANDO v. DANDO et al.**

**Civ. 11320.**

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1940.

**1. Husband and wife ⇐14(3)**

The executor of estate of wife, who died before trial of her action for partition of land owned by her and her husband as joint tenants, was not entitled to judgment therein, as husband became sole owner of entirety by survivorship on wife's death.

**2. Husband and wife ⇐14(3)**

The common-law rule that where husband and wife own realty as joint tenants, husband becomes sole owner of entirety by survivorship on wife's death, obtains in California, except as modified by statute.

**3. Joint tenancy ⇐4**

The mere fact that one joint tenant files action in partition does not work severance of tenancy.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action in partition by Susie May Dando, after whose death Edmund Nichols, executor of her estate, was substituted as party plaintiff against Albert B. C. Dando and others. From so much of the judgment rendered as awarded named defendant five of six parcels of land described in the complaint, the substituted plaintiff appeals.

Affirmed.

Philip C. Farman, of Los Angeles, for appellant.

W. Blair Gibbens, of Santa Monica, for respondent Albert B. C. Dando by his Guardian John W. Woodward.

STURTEVANT, Justice.

From a part of the judgment in an action in partition Edmund Nichols, executor of the estate of Susie May Dando, deceased, substituted in place and stead of Susie May Dando, deceased, has appealed.

On April 13, 1934, Susie May Dando filed a complaint in partition. She named as defendants Albert B. C. Dando, Edmund Nichols, Jr., guardian of Albert B. C. Dando, and Frances A. Berry. In her complaint she described six separate parcels of land. At the time said action was commenced plaintiff and Albert B. C. Dando were husband and wife and plaintiff alleged they were the joint tenants of said properties. She also alleged that Albert B. C. Dando was at said time an incompetent and that Edmund Nichols, Jr., was his guardian. On the 13th of April, 1934, Albert B. C. Dando, by his guardian, filed an answer. Later Edmund Nichols, Jr., was removed as the guardian of Albert B. C. Dando and John W. Woodward was appointed. On March 12, 1936, John W. Woodward filed an amended answer for the said Albert B. C. Dando. Among other things in that answer John W. Woodward alleged his substitution as guardian and also alleged that on the 29th day of April, 1934, the plaintiff Susie May Dando died. On July 13, 1934, Edmund Nichols, as executor of the estate of Susie May Dando, deceased, was substituted in place and stead of said Susie May Dando. The action was tried on the issues made by said pleadings and judgment was rendered on the 29th day of June, 1936. By the terms of the judgment parcels 1, 2, 3, 4, and 5, were awarded to the defendant Albert B. C. Dando, and the parcel described as number 6 was awarded to the plaintiff. No appeal has been taken from the judgment as to the latter parcel but the plaintiff appeals from all other parts of the judgment.

[1-3] The plaintiff contends the court erred in rendering judgment against the plaintiff and decreeing that the plaintiff has no interest in said five parcels of property and in not proceeding with a partition or sale of said properties. The contention is entirely without merit. That plaintiff's complaint stated a cause of ac-

tion as to each parcel as of the date plaintiff's complaint was filed is not controverted. However, after that date the plaintiff died. The above-mentioned amended answer, as appears from the allegations contained in it, was both an amended and a supplemental answer. Among other things it brought before the trial court the fact that the plaintiff had died since the action was commenced. Upon hearing the respective parties, and when it transpired that the plaintiff had died before the date of the trial, it is patent there was nothing left to partition. That is so because upon the death of Susie May Dando, her husband, Albert B. C. Dando, became the sole owner of the entirety by survivorship and in virtue of the original grant creating the tenancy. That was the common-law rule and it obtains in this state except as modified by statute. 7 Cal.Jur. 335, "Cotenancy", sec. 4. We have no statute declaring that the mere fact one joint tenant files an action in partition works a severance of the tenancy.

The portion of the judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




## MASHBIR v. MASHBIR

Civ. 12358.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1940.

Hearing Granted April 18, 1940.

**1. Husband and wife ⇐281**

In wife's action against husband for amount due under separation agreement, evidence *held* sufficient to sustain trial court's finding that such agreement was not replaced by another agreement whereby plaintiff waived and relinquished her rights to any sums of money or released defendant from any obligations under original agreement.

**2. Contracts ⇐32**

Where parties understand that terms of their contract are to be reduced to writing signed by them before contractual relationship shall exist, a binding or completed contract does not arise until writing evidencing terms of their agreement is executed by them.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Blanche B. Mashbir against Sidney Forrester Mashbir to recover an amount alleged to be due under a separation agreement. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dockweiler & Dockweiler, of Los Angeles, for appellant.

Overton, Lyman & Plumb and Cecil A. Borden, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a sum of money allegedly due under a separation agreement defendant appeals.

The material facts are:

Plaintiff's complaint alleged in substance that defendant owed her as arrearage under a separation agreement dated October 3, 1926, $10,466. Defendant by his answer denied generally the alleged indebtedness and as an affirmative defense asserted: "* * * that the agreement referred to in plaintiff's complaint, to-wit, the agreement of October 3, 1926, is no longer in force and effect, that on or about March 16, 1937, plantiff and defendant made and entered into an agreement replacing said agreement of October 3, 1926, by said agreement of March, 1937, that under said agreement of March, 1937, said plaintiff, * * * waived and relinquished any and all rights accrued or accruing to her, the said plaintiff, with respect to any and all sums of money to which she was or thereafter would be entitled under said agreement of October, 1926, and fully released defendant of and from any and all obligations under said agreement of October, 1926."

[1, 2] In rendering judgment in favor of plaintiff the trial court, among others, made the following finding: "6. The Court finds that it is not true, as alleged in de-

fendant's Answer, or otherwise, that the agreement referred to in plaintiff's Complaint, to-wit, the said agreement of October 3rd, 1926, is no longer in force and effect, or that on or about March 16th, 1937, or at any other time, or at all, plaintiff and defendant made and entered into, or made or entered into an agreement replacing said agreement of October 3rd, 1926, or that under said alleged agreement of March, 1937, the plaintiff, subject to certain provisions or to any provisions with which defendant has complied and/or to certain or to any additional obligations which the plaintiff has assumed, waived and relinquished, or waived, or relinquished any and all, or any, or all, rights accrued or accruing to her with respect to any and all, or any, or all, sums of money to which she was or thereafter would be entitled under said agreement of October, 1926, and/or fully, or at all, released defendant of and from, or of, or from any and/or all obligations under said agreement of October, 1926."

This is the sole question necessary for us to determine:

*Was there substantial evidence to sustain the trial court's finding of fact No. 6 set forth above?*

This question must be answered in the affirmative. Where the parties understand that, before a contractual relationship shall exist, the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. Dexter v. Ankiewicz, 26 Cal.App.2d 326, 333, 79 P.2d 400.

Evidence was received from which the trial court properly found that plaintiff and defendant separated in January, 1925, and entered into a separation agreement dated October 3, 1926, and were divorced in June, 1928.

From January, 1925, until January, 1937, there was considerable correspondence between plaintiff and defendant relative to defendant's failure to comply with the terms of the separation agreement. January 14, 1937, plaintiff wrote defendant a letter reading in part as follows: "Nearly three years have elapsed since we came to some sort of a temporary financial understanding which was for the time being and apart from the terms of our permanent contract. * * * The understanding was that you would send me $85.00 a month for a period of six months or so. * * * You informed Mr. Dixon at the time he was in Washington that you expected to be in very much better financial condition in a couple of years or so and would increase the amount as you were able. * * * I cannot help but feel you have arrived at the point where you can allow more than $85.00 a month. * * * Hoping that you will * * * try to comply with my reasonable request * * * (signed) Blanche."

January 18, 1937, defendant replied to the foregoing letter in a telegram wherein he asked plaintiff, if, provided he paid her $125 per month, she would cancel past accumulations. January 19, 1937, plaintiff telegraphed defendant stating she would require further time to consider his proposal and the telegram contained this statement: "Suggest you commence payment at increased rate mentioned your wire to be credited on account until modification if any agreed to between us."

January 21, 1937, defendant telegraphed plaintiff that he was mailing the regular remittance of $85 and was awaiting the modified contract mentioned in her telegram of January 19, 1937.

February 26, 1937, plaintiff's attorney wrote defendant a letter demanding full payment of the alleged arrearage under the separation agreement dated October 3, 1926. This letter, however, offered on behalf of plaintiff to accept in lieu of any balance due her under the agreement of October 3, 1926, the performance of certain conditions by defendant, which conditions were fully outlined therein. March 15, 1937, plaintiff's attorneys wired defendant as follows: "Your wire twelfth identical with your preceding proposal and still as unacceptable Stop have heretofore informed you one twenty five entirely inadequate Stop After careful consideration Mrs. Mashbir authorizes us to make following concessions She will waive accumulations provided you pay her punctually one fifty per month maintain life policies per our letter twenty sixth ultimo and bear reasonable and necessary expense boys college education regardless locality college Stop This her final determination and unless we have your acceptance of terms as herein outlined without any modification whatever by March eighteenth will proceed according to concluding paragraph our last letter."

March 16, 1937, defendant wired plaintiff's attorney thus: "I accept terms as out-

lined in your telegram March fifteenth Stop *Air mail necessary papers without delay.*" (Italics added.)

In addition to the foregoing there was testimony that defendant left Washington on a business trip en route to the Orient and stopped in Los Angeles, where he met with plaintiff and her attorney and signed in duplicate an agreement embodying the terms set forth in the letter of February 26, 1937, from plaintiff's attorneys to defendant; that both copies of the agreement at the suggestion of plaintiff's attorneys were left with him pending the examination of a life insurance policy which defendant had obtained pursuant to the terms of the parties' modified agreement. The understanding being that, if the insurance policy was satisfactory to plaintiff, defendant would receive a signed copy of the agreement upon his return from the Orient; that thereafter the insurance policy was examined by plaintiff and her attorneys and returned to defendant's office in Washington without complaint or objection; that upon defendant's return from the Orient he was served with a notice of rescission of the contract which the parties had entered into predicated upon the alleged fraud of defendant in misrepresenting his financial condition.

In the instant case the trial court's inference that the parties contemplated that their agreement should be reduced to writing and signed by them before it became effective finds substantial support in the evidence that defendant on March 16, 1937, in accepting plaintiff's offer wired "Air mail necessary papers without delay," and further that later, when defendant signed both copies of their proposed agreement, he left them with plaintiff's attorneys on the understanding that, if certain insurance policies were satisfactory, a signed copy of the agreement would be delivered to defendant. This evidence indicates that neither plaintiff nor defendant considered their negotiations operative until their agreement had been reduced to writing, signed, and a copy delivered to each.

Therefore, applying the above-mentioned rule of law to the finding of the court set forth above, which we have indicated is sustained by substantial evidence, the parties' negotiations were never completed and the original separation agreement of October 3, 1926, was not superseded by a subsequent agreement.

In all of the cases relied on by defendant, such as Nash v. Kreling, 6 Cal.Unrep. 238, 56 P. 262; Conner v. Plank, 25 Cal.App. 516, 144 P. 295; Hollenbeck v. Lunderville, 67 Cal.App. 432, 227 P. 679, the trial court found that the parties by their negotiations intended that there should be a binding contract prior to the reduction of their negotiations to writing, or the evidence was such that only one conclusion could be reasonably drawn therefrom, to-wit, that the parties intended the correspondence passing between them to constitute a binding contract prior to the time of the preparation and signing of any formal agreement.

Further discussion of these cases and the able argument predicated by counsel thereon is therefore unnecessary.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.




37 Cal.App.2d 402

**PEOPLE v. REIFENSTUHL.**

Cr. 3281.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1940.

Hearing Denied March 21, 1940.

**1. Gaming ⇐98(5)**

Testimony of police officer sustained conviction of defendant for occupying a room for purpose of registering bets on horse races, especially in view of defendant's failure to explain the evidence. Pen.Code, § 337a, subd. 2.

**2. Criminal law ⇐404(4)**

Where defendant at time of arrest occupied the room and attempted to conceal papers used by gamblers for recording bets on horse races, such papers were major element of offense of occupying a room for purpose of registering bets on horse races. Pen. Code, § 337a, subd. 2.

**3. Gaming ⇐98(5)**

In prosecution for occupying a room for purpose of registering bets on horse races, intent could be gathered from all the circumstances shown in evidence. Pen.Code, § 337a, subd. 2.

**4. Gaming ⇐98(5)**

In prosecution for occupying a room for purpose of registering bets on horse races, it was not necessary to actually establish that races upon which bets were being taken were actually being run at the time. Pen.Code, § 337a, subd. 2.

**5. Criminal law ⇐1160**

Where evidence tends to support verdict, it will not be disturbed, and application of such rule is strengthened where trial court has refused a new trial.

**6. Criminal law ⇐741(1)**

The weight to be accorded evidence is question for jury.

**7. Criminal law ⇐1159(2)**

The appellate court may disturb a finding of trial court only when it can say, as a matter of law, that there was no evidence to support it.

**8. Criminal law ⇐368(1), 419(11)**

In prosecution for occupying a room for purpose of registering bets on horse races, officer's telephonic conversation with unknown patron of defendant while in room occupied by defendant at time of arrest was not inadmissible as "hearsay," but was admissible as part of "res gestæ." Pen.Code, § 337a, subd. 2.

[Ed. Note.—For other definitions of "Hearsay Evidence" and "Res Gestæ," see Words & Phrases.]

**9. Criminal law ⇐1159(3)**

Where circumstances reasonably justify an inference of guilt, fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by appellate court.

---

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Audrey Reifenstuhl was convicted of violating statute making it a felony for any person to keep or occupy a room or inclosure of any kind with books or paraphernalia for purpose of recording bets upon the results of horse races, and she appeals.

Affirmed.

Leland E. Zeman, of Los Angeles (Charles Hollopeter, of Los Angeles, of counsel), for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment of conviction for violating subdivision 2, section 337a of the Penal Code and from the order denying her motion for a new trial. Said subdivision makes it a felony for any person to keep or occupy a room or enclosure of any kind with books or paraphernalia for the purpose of recording bets upon the results of horse races. The bases of her appeal are as follows: (1) insufficiency of the evidence; (2) the officer's telephonic conversation in the room occupied by defendant with an unknown party was erroneously admitted; (3) the court should have accepted the hypothesis of innocence.

(1) The defendant was an employee in a drug store on Wilshire boulevard; she occupied a room to the rear, upstairs. When the officer entered the room, defendant was sitting twenty feet from the entrance at the desk. As the officer entered, she pushed a scratch sheet under the desk where she was seated and did nothing more. Beside her desk stood a man who put down two half-dollar coins and said to the defendant: "Give me $1 to win on Aces Wild." The officer said: "Betty, I told you that we would be up here again; that we would catch you book making" to which she responded: "Yes, I know you told me."

[1-3] The officer took from the top of defendant's desk a master scratch sheet and retrieved a National scratch sheet which she had cast beneath the desk and which was dated June 17, 1939, the day of the arrest. The master scratch sheet contained the names of horses and their numbers. The National scratch sheet contained a list of the races, the names of the horses, the jockeys and their weights, running on different race tracks in different parts of the United States. The piece of paper recovered by the officer from the waste basket contained the names of six horses with numerals appearing opposite their names which indicated three two-horse parlays. Two newspapers, open at the page containing racing information, lay upon the long counter. The officer found two telephones in the room, both of which rang as he conferred with defendant. Answering one of them, the officer spoke: "No, she is not. She is busy. Is there anything I can do for you?" To his question, the voice replied: "I want $1 to win on Nilka in the third race at Hollywood and one on Cozette to show in the fourth race. This is M. T. talking."

The officer told him "he was on". Defendant said nothing. Six weeks previously the same officer had called at the room when he found the "same condition" and six or eight people in the room. Defendant made no denial of any fact given in the testimony.

[4-7] The foregoing facts are sufficient to warrant a conviction of the defendant for occupying a room for the purpose of registering bets on horse races. People v. Hatfield, 77 Cal.App. 212, 246 P. 95; People v. Paluso, 27 Cal.App.2d 642, 81 P.2d 630; People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571; People v. Sutherland, 59 Cal.App. 462, 210 P. 965; People v. Smith, Cal.App., 94 P.2d 633. Such proof is especially persuasive in view of defendant's failure to explain the evidence. People v. Schrader, 32 Cal.App.2d 543, 549, 90 P.2d 331. Where the accused at the time of arrest occupied the room and attempted to conceal the papers used by gamblers for recording bets on horse races, such papers are a major element of the offense. People v. Hatfield, supra. "The intent with which the act was done may be gathered from all the circumstances shown in evidence." People v. Tuttle, supra [27 Cal.App.2d 647, 81 P.2d 572]. "It was not necessary that it be actually established that the races upon which bets were being taken were actually being run at the time." People v. Sutherland, supra [59 Cal.App. 462, 210 P. 966]. It is uniformly held that where the evidence tends to support the verdict it will not be disturbed and the application of this rule is strengthened where the trial court has refused a new trial. The weight to be accorded the evidence is a question for the jury. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, 470. The appellate court may disturb a finding of the trial court "only when we can say, as a matter of law, that there was no evidence to support it". People v. Tedesco, supra; People v. Willard, 150 Cal. 543, 89 P. 124.

[8] (2) Defendant complains that the conversation by the officer with the telephonic patron while in the room and in the presence of the defendant was hearsay and that its admission was prejudicial. With this we cannot agree. That conversation coming in the midst of the occurrences concerning defendant at the time of her arrest is a circumstance to be considered. It was not subject to the hearsay rule. The conversation was not admitted for the purpose of proving its own contents (16 Cor.Jur. 624) but to prove the use to which the telephone was subjected by the public and to demonstrate the reaction of the defendant at the time. The use of the room occupied by defendant was in issue and the nature of the telephonic call was a circumstance to establish the truth. The uses to which a telephone is put reveal more truthfully the character of the establishment that houses the instrument than do the words of description attached to the listing. When a call comes to one surrounded by paraphernalia in use for the very purposes that would serve the patron so calling, the communication becomes a part of the res gestae. It was one of "the undesigned incidents of [and caused by] particular litigated acts". Estate of Gleason, 164 Cal. 756, 130 P. 872, 875; Code Civ.Proc., § 1850. "The testimony is only applicable to rem ipsam, as a contemporaneous fact forming part of the res gestæ, and as such is admissible, just as any other contemporaneous physical occurrence could be proven." State v. Horton, 33 La.Ann. 289.

It is pertinent here to observe that in the case of a book maker, the telephone is an indispensable facility for the extension and safe expedition of his business. Also, it served practically to conceal both the offender and his client from public view in the conduct of illicit transactions and lessens the risk of police apprehension. As the means by which the public might place bets with the defendant, the two instruments constitute a part of defendant's paraphernalia. The order of "M. T." to place $1 each on Nilka and Cozette, while defendant was at hand to protest, or to endorse it as the act of a cherished patron, is evidence of the use for which the room was maintained.

The use of a telephonic conversation as evidence against the party who was present and who was addressed by the invisible person is exemplified in the case of People v. Helt, 100 Cal.App. 279, 279 P. 1046. The conversation was there objected to as hearsay but its admissibility was approved by this court and was cited as one of the circumstances comprising proof of appellant's guilt.

[9] (3) Defendant admits that "it can be fairly stated that there may have been a hypothesis, although a weak one, that the crime denounced by said subdivision was committed". She then argues that since there was a reasonable hypothesis that no crime at all was committed, the trial court should have chosen the hypothesis of innocence rather than that of guilt,

In this case, it was the right and the duty of the trial court to determine whether or not a crime had been committed by the defendant. People v. Patello, 125 Cal.App. 480, 13 P.2d 1068. That court having so concluded upon evidence which contains sufficient basis to justify the finding of guilt, this court would be exceeding its powers to interfere with his decision. "Where the circumstances * * * reasonably justify an inference of guilt * * * the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. In neither case will the verdict be disturbed." People v. Martinez, 20 Cal.App. 343, 128 P. 952, 953.

The judgment and order are affirmed.

We concur: WOOD, J.; McCOMB, J.




37 Cal.App.2d 407

## PEOPLE v. MASON.

Cr. 3294.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1940.

**1. Gaming** ⇐98(5)

Evidence was sufficient to justify conviction of occupying a room for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

**2. Criminal law** ⇐517(4)

Since elements of crime may be established by circumstantial evidence, court is warranted in receiving confession when prima facie proof of corpus delicti has been presented.

**3. Criminal law** ⇐517(4)

The presence of all of paraphernalia for operating a book-making establishment, together with telephones and headpiece, in a small bungalow in remote residential portion of city, were sufficient to establish prima facie "corpus delicti" of crime of occupying a room for purpose of registering bets on horse races, so as to warrant receiving defendant's confession in evidence. Pen.Code, § 337a, subd. 2.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words & Phrases.]

**4. Criminal law** ⇐517(4)

Proof of corpus delicti, of conclusive and convincing character required to support conviction of crime charged, is not a prerequisite to reception in evidence of extrajudicial statements of defendant.

**5. Criminal law** ⇐517(1), 535

Where confession is freely and voluntarily made, it is admissible as evidence in support of corpus delicti as well as of criminal participation of the defendant.

**6. Criminal law** ⇐517(4)

Rule requiring proof that a crime has been committed before admission of confession of defendant is not intended to govern the order of trial, but rather is a rule of substantive law designed to protect the accused against a conviction for crime unless crime itself is established.

**7. Criminal law** ⇐1036(6)

The appellate court would not consider defendant's contention that error was committed in admitting testimony of police officer as an expert on book-making establishments without first showing his qualifications, where no specific objection was interposed to such testimony in trial court.

**8. Criminal law** ⇐1043(2)

The appellate court will not consider an objection to evidence unless the precise grounds of objection were specified in trial court.

**9. Criminal law** ⇐1036(6)

In prosecution for occupying a room for purpose of registering bets on horse races, testimony of police officer attached to vice squad from his experience concerning scratch sheets and betting markers was competent and afforded basis for admission in evidence of markers and scratch sheets taken from defendant's residence at time of his arrest, in view of officer's experience and patent qualifications, where no specific objection was interposed as to officer's qualifications to testify as an expert. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

James D. Mason was convicted of violating statute which inhibits the occupancy of a room with paraphernalia for purpose of recording bets on horse races, and he appeals.

Affirmed.

B. Warren Vinetz, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant was convicted of violating subdivision 2 of section 337a of the Penal Code which inhibits the occupancy of a room with paraphernalia for the purpose of recording bets on horse races. He bases his appeal upon the following grounds: (1) insufficiency of the evidence; and (2) errors of law in the admission of the evidence.

[1] (1) Defendant was arrested in a living room of a bungalow in a bungalow court in an outlying residential section of Los Angeles. The arresting officer took from his hand two rundown sheets dated June 13; lying on the table in the center of the room were various betting markers and additional rundown sheets. The officer took from defendant's pocket a National scratch sheet, a rental receipt for the bungalow and a key to the front door of the bungalow. Three telephones and a headset were installed in the living room. Defendant stated to the officer that he was making a book; that the betting markers were in his hand writing; that he had been there a week and that no one else had anything to do with the bookmaking; that he had once had partners but was then working on his own. The betting markers taken from the table contained the names of "Bosca" and "Easter Parade" as horses running at the Hollywood track on the date of the arrest. The landlord identified defendant as the person to whom he had rented the bungalow.

The foregoing facts are both sufficient and competent to justify the conviction of defendant of the crime of which he was accused. See People v. Reifenstuhl, Cal. App., 99 P.2d 564, this day filed; People v. Hinkle, 64 Cal.App. 375, 221 P. 693.

[2-6] (2) The claim of prejudicial error in admitting the defendant's confession before the proof of the corpus delicti cannot be sustained. Since the elements of the crime may be established by circumstantial evidence, the court was warranted in receiving such confession when prima facie proof of the corpus delicti had been presented. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571. The presence of all of the paraphernalia for operating a bookmaking establishment together with the telephones and headpiece in a small bungalow in a remote residential portion of the city, were sufficient to establish the body of the crime. The presence of the markers and scratch sheets constitutes the major element of the offense charged. People v. Smith, Cal.App., 94 P.2d 633; People v. Hatfield, 77 Cal.App. 212, 246 P. 95. Proof of the corpus delicti, of the conclusive and convincing character required to support the conviction of the crime charged, was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant. Where a confession is freely and voluntarily made, it is admissible as evidence in support of the corpus delicti as well as of the criminal participation of the accused. Full proof of the corpus delicti independently of the confession of the accused is not required; otherwise it could serve no office except to prove the criminal agency. People v. Selby, 198 Cal. 426, 435, 245 P. 426. Moreover, a fair interpretation of the rule requiring proof that a crime had been committed before the admission of the confession of the defendant is that it is not intended to govern the order of trial but rather is it a rule of substantive law designed to protect the accused against a conviction for crime unless the crime itself be established.

[7-9] Defendant's contention that error was committed in admitting testimony of the police officer as an expert on bookmaking establishments without first showing his qualifications, has no basis for the reason that no specific objection was interposed to such testimony. A general objection will not suffice. The appellate court will not consider an objection to evidence unless the precise grounds of the objection was specified in the trial court. 8 Cal.Jur. 503. The trial proceeded upon the theory that the officer was an expert upon the subject of his testimony and the statement by the court that he was an expert was not challenged by defendant. The witness, being an officer attached to the vice squad of

the city of Los Angeles, testified from his experience concerning the scratch sheets and the betting markers. In view of his experience and patent qualifications, the testimony was competent and afforded a substantial basis for the admission of the markers and scratch sheets in evidence.

For the reasons indicated, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.




37 Cal.App.2d 410

**GUY COBURN, Inc., v. TIFFANY PRODUCTIONS, Inc., et al.**

**Civ. 11327.**

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1940.

Hearing Denied April 18, 1940.

**1. Appeal and error ⇐671(1)**

In action for accounting, plaintiff's statement that one obtaining another's property for purpose of exploiting it and dividing profits has burden of proof, in owner's action for accounting, presents no question on appeal from judgment for defendants, where plaintiff assumed burden of proof at all times and trial court made no ruling purporting to shift burden.

**2. Appeal and error ⇐500(1)**

In action for accounting, plaintiff's point on appeal from judgment for defendants that contention that there were no profits from parties' venture does not mitigate against plaintiff's right to full accounting presents no question for appellate court, where record shows no contrary ruling of trial court and evidence shows that defendants rendered numerous accounts, which were not questioned until action was filed, and that plaintiff never challenged truth of any item in any of such accounts.

**3. Appeal and error ⇐1071(1)**

In action for accounting, trial court's finding that plaintiff was not sole owner of, or entitled to receive, half of all sums realized from exploitation and distribution of motion picture after deducting cost of production and distribution, but that persons not parties to action owned certain interests therein, was not prejudicial to plaintiff, in view of other findings that no profits were made.

**4. Account stated ⇐19(3)**

In action for accounting, evidence that defendants rendered 18 accounts of their receipts and disbursements and that plaintiff received and retained them for several years without objecting thereto showed prima facie stated accounts constituting valid defense.

**5. Appeal and error ⇐934(2)**

On appeal from judgment for defendant, appellate court must assume that trial court based judgment on valid defense to action, not on court's erroneous fact finding.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Guy Coburn, Incorporated against Tiffany Productions, Incorporated, and others, for an accounting. Judgment for defendants, and plaintiff appeals.

Affirmed.

Jerome H. Kann, of Los Angeles, for appellant.

Sam Wolf and Leo Shapiro, both of Los Angeles, for respondents.

STURTEVANT, Justice.

The plaintiff commenced an action to obtain an accounting. After it had introduced its proof the trial court granted defendants' motion for a nonsuit. The plaintiff appealed and the judgment based on the motion for a nonsuit was reversed. Guy Coburn, Inc., v. Tiffany Productions, Inc., 220 Cal. 418, 30 P.2d 996. The Supreme Court remanded the action to the trial court with directions to proceed with the trial from the point where plaintiff rested its case. However, on the second trial a hearing de novo was had. The plaintiff introduced evidence both oral and documentary. The defendants again made a motion for a nonsuit. The motion was denied. Thereupon the defendants rested. The trial court ordered judgment for the defendants. Thereafter it made a complete set of findings. In effect the findings are as follows: That the plaintiff is a corporation; that Tiffany Productions and Tiffany-Stahl Productions are both corporations; that on the 21st day of

August, 1926, Harry Wurtzel, as the agent of plaintiff, assigned to Phil Goldstone Productions his motion picture rights to the book entitled "Wild Geese"; that Phil Goldstone Productions produced the picture and Tiffany Productions, Inc., exploited and distributed it; that said picture was exhibited to the public December 3, 1927, and for a considerable period thereafter; that under the contract of assignment it was agreed that Phil Goldstone Productions would make the picture for Tiffany Productions and that the said Phil Goldstone Productions would pay to the assignor $3,850 by canceling a certain note and that it would also pay to the assignor all moneys received from Tiffany Productions; and that Tiffany Productions would pay fifty per cent of the moneys it received above the advance and sales cost. Continuing the trial court found as follows:

"The court finds that said defendants have kept true and accurate books of account showing all items of income and expense in connection with the production, exploitation and distribution of said motion picture.

"The court further finds that defendants have at all times given to plaintiff full, true and accurate reports and accounts showing all items of income and expense in connection with the production, exploitation and distribution of said motion picture.

"The court further finds that said motion picture was produced as a silent motion picture, and that shortly prior to July, 1929, talking or dialogue motion pictures were introduced and generally made and produced in the motion picture industry in lieu of silent motion pictures, and that as a result thereof, silent motion pictures became of little or no value, and it became unprofitable to further exhibit and distribute the said silent motion picture entitled 'Wild Geese'.

"The court further finds that the defendants ceased to exhibit and distribute said motion picture on or about the 13th day of July, 1929, and that full, true and correct reports and accounts showing the income and expense in connection with the production, exploitation and distribution of said motion picture were furnished by defendants to plaintiff at regular monthly intervals covering the period to and including the said 13th day of July, 1929.

"That the defendants have received no net profit, or any profit from said picture, and that the cost of production, exploitation and distribution of said motion picture was in excess of the total of all sums received by said defendants in connection with the exploitation and distribution of said motion picture.

"The court further finds that it is not true as alleged in paragraph VI of plaintiff's amended complaint that the net profit from said motion picture was or is the sum of $30,000.00, or any other sum whatsoever, and the court finds that it is true that there were and are no net profits resulting from the production, exploitation and distribution of said motion picture.

"The court further finds that it is true that defendants and each of them have fully kept and performed each, all and every of the terms, covenants, conditions, obligations and agreements on their part in said contract dated August 21, 1926, to be kept and performed.

"The court further finds that at the time of the filing of the within action, plaintiff was not the sole owner of or entitled to receive fifty per cent (50%) of all sums realized from the exploitation and distribution of said motion picture entitled 'Wild Geese', after deduction of actual cost of production, exploitation and distribution thereof, but that other persons not parties to this action owned certain interests therein."

[1] The plaintiff says: "One who obtains the property of another for the purpose of exploiting the same and with the understanding to divide the profits has the burden of proof in an action for an accounting brought by the owner of the property." Conceding, without deciding, the soundness of that statement, the record contains nothing showing its applicability to the facts of this case. At all times the plaintiff assumed the burden of proof. No ruling was made by the trial court purporting to shift the burden of proof.

[2] In its next point it claims: "The purpose of an accounting is to ascertain whether there is anything due to plaintiff and the amount thereof, and a contention that there were no profits from the venture does not mitigate against the right of the plaintiff to a full accounting." The record does not show any ruling of the trial court to the contrary. On the other hand, the evidence shows the defendants rendered numerous accounts and that no one of them was questioned until this action was filed and at no time has the plaintiff challenged

the truth of any item contained in any one of the eighteen accounts that were so rendered.

[3] Its last point is that: "A party, vested with the legal title of ownership, is the real party in interest regardless of collateral agreements as to beneficial interests of third persons." It points to the last paragraph of the findings and contends the trial court based its judgment thereon. That finding, in view of the other findings which we have quoted, was not prejudicial. If no profits were made then the quantum to be accounted for was naught and neither the plaintiff nor any other person claiming to be a beneficiary could be wronged in a failure to account therefor.

[4, 5] When it transpired that the defendants had rendered eighteen accounts of their receipts and disbursements and that the plaintiff had received and retained them for several years without making any objection thereto, such facts prima facie showed stated accounts which constituted a valid defense. 1 C.J.S., Accounting, § 29, p. 661; Robinson v. Miller, 210 App.Div. 450, 206 N.Y.S. 248; Lavers v. Hutton, 122 Misc. 516, 203 N.Y.S. 235. In support of the judgment we must assume the trial court based its judgment on such defense and not on the finding discussed immediately above. 2 Cal.Jur. 1028.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




37 Cal.App.2d 367

## AXELROD v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11101.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1940.

**1. Schools and school districts ⇐144(4)**

Where board of education of city and county of San Francisco granted a leave of absence from duties for one year to a permanent teacher in elementary schools, and the teacher was absent from duties for 12 months, the amount, if any, to be deducted from salary due teacher for months in which such absence occurred was for determination by board according to its rules and regulations. School Code, § 5.750, as added by St.1931, p. 856.

**2. Mandamus ⇐187(9)**

On appeal from judgment denying relief to teacher in proceeding to compel board of education to grant compensation to teacher for period of absence from duties, it would be assumed, in support of judgment, that leave of absence, which, as written, was without compensation, was intentionally worded as written, where it was not shown that deduction from salary for the absence of one year was not determined by board in accordance with its regulations. School Code, § 5.720; and §§ 5.721–5.723, 5.750, as added by St.1931, pp. 1399, 1598, 1599, 856.

**3. Mandamus ⇐107**

Where a permanent teacher in elementary schools, due to approaching childbirth, had been granted leave of absence from duties for one year by board of education, teacher could not compel board to award her compensation for the year's absence where leave of absence, as written, was without compensation, and the teacher did not allege and prove facts concerning dates of illness or childbirth, or that members of board did not act in accordance with regulations of board in making deductions from teacher's salary during teacher's absence. School Code, § 5.720; and §§ 5.721–5.723, 5.750, as added by St.1931, pp. 1399, 1598, 1599, 856.

Appeal from Superior Court, City and County of San Francisco; A. F. Bray, Judge.

Proceeding by Lucille Axelrod against the Board of Education of the City and County of San Francisco, State of California, and C. Harold Caulfield and others, as Commissioners, and constituting the Board of Education of the City and County of San Francisco, State of California, to obtain a writ of mandate directing defendants to cause to be paid to plaintiff $666.94 claimed to be due plaintiff as compensation as a permanent teacher in certain schools. From a judgment for defendants, plaintiff appeals.

Affirmed.

Albert A. Axelrod, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

The petitioner, hereinafter called the plaintiff, commenced a proceeding to obtain a writ of mandate directing the respondents, hereinafter called the defendants, to cause to be paid to the plaintiff $666.94 claimed to be due her as compensation as a permanent teacher in the elementary schools of the city and county of San Francisco. The trial court made findings in favor of the defendants and from the judgment entered thereon the plaintiff has appealed and has brought up the judgment roll.

Prior to the first of January, 1934, the plaintiff applied to the defendants, as and constituting the Board of Education of the City and County of San Francisco, for, and was granted, a leave of absence from her duties as a permanent teacher from January 1, 1934, to December 31, 1934. During that period, if she had not been absent, her compensation would have been $1,601.94. During the absence of the plaintiff the defendants employed a substitute to whom they paid $935. Having recited those facts the plaintiff claims to be entitled to the difference between the two sums, to-wit, $666.94. The leave of absence granted by the defendants was, as written, without compensation. There are recitals in the plaintiff's petition and also in the findings to the effect that the plaintiff was pregnant and applied for the leave of absence for that reason. She alleges that she "* * * was compelled to absent herself from her duties as a teacher in said elementary schools because of illness occasioned by approaching childbirth; * * *" There is no allegation and no finding reciting the date her child was born, nor is there any allegation directly to the effect that she was ill at any time nor giving any date or dates on that subject. There is no allegation as to "* * * the rules and regulations established by the governing board of the district", regarding deductions from the salary of a teacher during her absence. Nor is there any allegation as to whether the defendants made the deduction in question according "* * * to the rules and regulations established by the governing board of the district".

[1] The plaintiff relies on the provisions of section 5.750 of the School Code, as added by St. 1931, p. 856, as supporting her claim. In so far as pertinent that section provides: "When a person employed in a position requiring certification qualifications is absent from his duties on account of illness for a period of more than five school months, or when a person is absent from his duties for a cause other than illness, the amount deducted from the salary due him for the month or months in which such absence occurs shall be determined according to the rules and regulations established by the governing board of the district." Bearing in mind that the uncontroverted fact is that the plaintiff was absent twelve months, it is clear the amount, if any, to be deducted from the salary due her for the months in which such absence occurred was to be determined by the defendants according to their rules and regulations. There is nothing in the record showing that the deduction was not so made.

[2] The defendants contend the rights of the plaintiff are governed by sections 5.720–5.723 of the School Code, as added by St. 1931, pp. 1399, 1598, 1599. They deal with leaves of absence. As noted above, the plaintiff applied for, and was granted a leave of absence for twelve months, commencing with the month of January, 1934. In granting it the defendant board had the power to grant the leave with or without compensation. Sec. 5.721. It will be noted, however, that the leave of absence so granted was made without compensation. As it is to be presumed that the defendants regularly performed their official duty, it will be assumed in support of the judgment that the leave of absence was intentionally worded as written. If it was, then it is obvious the plaintiff had no claim.

[3] The plaintiff says she did not during the trial, nor does she now contend that pregnancy in and of itself is illness, but it is her contention that her absence was due to illness that was occasioned by approaching childbirth. At the time of childbirth, for a period prior thereto, and for a period subsequent it may be assumed the plaintiff was ill. But, in the absence of proof, it may not be assumed she was ill

twelve months. Furthermore, it may be conceded that under some circumstances during the absence of a teacher owing to such illness the teacher's compensation may be continued in whole or in part. School Code secs. 5.721, 5.750. However, it is entirely clear that one who would base a claim on such facts must necessarily plead and prove them. The plaintiff has done neither.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




37 Cal.App.2d 394

**CVECICH v. GIARDINO et al.**

**Civ. 11012.**

**District Court of Appeal, First District, Division 1, California.**

**Feb. 20, 1940.**

**1. Limitation of actions ⇐169**

Under statute providing that where cause of action arising in foreign state is barred by limitations in that state, action cannot be maintained in California, where cause of action on mortgage bond arose in New York and plaintiff was a nonresident, New York statute of limitations prescribed maximum period within which action could be brought in California. Code Civ.Proc. § 361.

**2. Limitation of actions ⇐89**

The statute tolling limitations against a person who is out of the state, but authorizing commencement, "after his return to this state" was not intended to apply only where defendant has at some time before filing of action been within the state and thereafter left the state and then returned, but applies to a nonresident defendant who has at no time been in the state prior to commencement of the action, since the word "return," though normally implying coming back after having first been in the state, is interpreted to mean that statute applies so as to toll limitations, not only where the defendant has once been a resident and leaves state and returns, but also where defendant has never been in or resided in the state until filing of the complaint. Code Civ.Proc. § 351.

[Ed. Note.—For other definitions of "Return," see Words & Phrases.]

**3. Limitation of actions ⇐87(3)**

Statutory provision suspending statute of limitations while defendant is a nonresident is not affected by the nonresidence of the party asserting cause of action. Code Civ.Proc. § 351.

---

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action on a mortgage bond by Augusta Cvecich against Lucy Giardino and others. From a judgment for the plaintiff, named defendant appeals.

Affirmed.

Joseph E. Tinney and Charles P. Molinari, both of San Francisco, for appellant.

Julian H. Biddle, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $4,000 plus interest. Appellant's sole contention is that, when the complaint was filed, the cause of action was barred by the statute of limitations. Appellant concedes executing the obligation forming the basis of the action, that she has not paid it, and that she has no defense on the merits.

The facts are not in dispute, and are as follows: On April 2, 1929, in New Jersey, appellant, a resident of New Jersey, executed her written bond wherein she agreed to pay respondent, Augusta Cvecich and her husband, both residents of New York, the sum of $4,000 on April 1, 1932. This obligation was payable in New York. It was secured by a mortgage on New Jersey real estate. Respondent has become the sole owner of that obligation. The debt was not paid when due. Prior liens on the real property were foreclosed, so that respondent's security was rendered valueless. Respondent commenced this action in California on February 23, 1937 (approximately five years after the due date of the obligation), and attached certain property of the appellant in this state. Respondent at all times involved herein was a resident of New York. She brought this action through her attorney, she at no time

being physically present in this state. Appellant appeared in the action through her attorney, she being at all times involved herein a resident of New Jersey. At no time has she been physically present in this state. The trial court found that the cause of action was not barred by either the statute of limitations of California or of New York. There is some dispute as to whether, if suit had been brought in New York, a twenty-year statute of limitations dealing with sealed contracts, or a six-year statute of that state dealing with written contracts, would be applicable. This dispute is immaterial because, under either provision of the New York law, the action was commenced in this state before it was barred in New York.

It is the theory of appellant that the cause of action was barred by section 337, subdivision 1, of the Code of Civil Procedure, which prescribes a four-year period for the commencement of actions upon any written contract or obligation.

It is conceded that the action having been brought in California is governed by the statute of limitations of this state. 16 Cal. Jur., p. 411, § 22. It is the theory of respondent, which theory was adopted by the trial court, that, under the law of this state, since the defendant was out of the state from the inception of the obligation until she appeared by attorney herein, the statute was tolled during that period, and would continue to be tolled, plaintiff being a nonresident, until barred by the statute of limitations of New York, where the obligation was payable. This contention is predicated upon the provisions of sections 361 and 351 of the Code of Civil Procedure.

[1] Section 361 provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." Under this section, the cause of action having arisen in New York, and plaintiff being a nonresident of this state, the New York statute of limitations—in the present case not less than six years—prescribes the maximum period within which the present action could have been brought in California. The present action was commenced well within this maximum period.

Section 351 of the Code of Civil Procedure provides: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

[2] Appellant contends that, because the section uses the expression "return" to this state, the section has no application to a nonresident defendant who, at no time until she appeared in this action, was ever in this state; that such a defendant could not "return" to a state that she has never entered; that to "return" to a state the defendant must have previously entered this state. Further, it is the contention of appellant, that section 351 does not apply where both the plaintiff and defendant are nonresidents of this state, but only applies in favor of residents. Both contentions are unsound.

If appellant's construction of section 351 were adopted, so that the section were held to apply only where the defendant has at some time before the filing of the action been within the state, has thereafter left the state, and then returned, it would lead to confusion and unfairness. The result of appellant's construction would be, since it depends upon the facts pertaining to the defendant's absence from the state, that a resident plaintiff could not rely on section 351 as tolling the statute as against a nonresident defendant who had not come into this state prior to action brought. It would seem that the statute was not intended to have that result.

Moreover, if appellant's construction were adopted, it would lead to confusion. At what time must the defendant have been within the state prior to the commencement of the action? Must he have been within the state at some time after the creation of the obligation, and then left and returned, or is it sufficient that he may have been within the state at some remote past time? It would seem unlikely that the legislature could have intended that the operation of the statute should turn upon such uncertain and immaterial factors.

There is no case in California directly passing on this point. There are several cases, however, interpreting section 351 of the Code of Civil Procedure to which reference should be made. In Dougall v. Schu-

lenberg, 101 Cal. 154, 157, 35 P. 635, an action was brought upon a promissory note executed and payable in Canada. Both makers were nonresidents and so continued until within a period of less than two years before commencement of suit. The court said: "Since the notes were, in express terms, payable in Ontario, and both of the payors were nonresidents of this state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterwards they left the state the time they were so absent would not be a part of the time within which the suit must be commenced. Code Civ.Proc., sec. 351."

In McKee v. Dodd, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82, action was brought on a claim based on notes executed in 1891 in New York and there payable before expiration of the year. Both maker and payee were residents of that state. The maker came to California in June, 1892, and remained until April, 1893, when he went to Honolulu and there resided until his death in 1900. During his Honolulu residence he made several short visits to San Francisco. If section 351 applied, the action was in time. Citing Dougall v. Schulenberg, supra, the court held that the action was in time. It should be noted that plaintiff in this case was a nonresident of California.

In Chappell v. Thompson, 21 Cal.App. 136, 138, 131 P. 82, 83, the action was upon an Iowa judgment, brought more than six years after rendition of the judgment. In Iowa action could be brought on a judgment within fifteen years. In holding that the California action was not barred the court said: "Omitting all reference to the provision contained in section 351, 'the weight of authority is that the statute of the forum does not begin to run until the defendant comes within the jurisdiction in which suit is brought, and that the time elapsing between the accrual of the right of action in the foreign state and the acquiring of domestic residence forms no part of the statutory period of the forum.' Annotator's note to Rutledge v. United States Savings & Loan Co., 5 Ann.Cas. 542." See, also, Foster v. Butler, 164 Cal. 623, 130 P. 6.

None of these cases, it is true, involved a nonresident defendant who never was physically present in the state. However, they are persuasive. None of the cases emphasized the fact of former presence in this state. The emphasis that appellant seeks to place upon the word "return" in section 351 is unwarranted. She contends that, solely because of the use of that term, the legislature intended to require that, before the section operates to toll the statute, the defendant must have been in this state, left it, and returned to it. While it is true that normally the term "return" carries with it the implication of coming back after having first been here, the term as used in statutes of limitations, and particularly in statutes of the nature of section 351, has quite uniformly been interpreted to mean that the section applies so as to toll the statute not only where the defendant was once a resident of the state and leaves it and returns, but also where the defendant has never been in, or resided in, the state until the filing of the complaint. The term as used in statute of limitations has come to have this special meaning. The applicable principles, supported by authorities from many states (Texas alone being cited to the contrary), are stated as follows in 17 Ruling Case Law, page 837, section 199: "According to the generally accepted doctrine, if the statute provides that the period of limitation shall not run in favor of a debtor who is absent from or out of the state, the saving clause extends to foreigners, or those who have never resided in the state, as well as to citizens who may be temporarily absent. Whether the defendant be a resident of the state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged until he comes within its jurisdiction. This has been the uniform construction of the English statutes, *which also speak of the return from beyond seas of the party so absent.* So, unless the statute otherwise provides although a nonresident debtor has property within the state, the operation of the statute is suspended while he is absent from the state. * * * It is also generally held in this connection that *the doctrine that such exceptions are applicable to nonresidents is not affected by the fact that the statute provides for the bringing of the action within a certain time after the return of the debtor to the state,* it being declared that the word applies as well to persons coming from abroad as to citizens from a state going abroad and then returning. This is also in line with the con-

struction of the word 'return', as used in the English statute in speaking of the return from beyond the seas of the party absent, which has always been construed as including both Englishmen who went abroad occasionally and foreigners residing abroad." (Italics ours.)

The above interpretation is in accord with the construction given to the California law by the Circuit Court of Appeals for the Second Circuit in Irving Nat. Bank v. Law, 10 F.2d 721. In that case, in discussing a legal situation substantially similar to the one here involved, the court stated (10 F.2d at page 722): "The law of California (Code Civ.Proc.Cal. § 351) tolls the statute against a nonresident who has never been in the state. 'Return' is equivalent to 'enter.' Foster v. Butler, 164 Cal. 623, 130 P. 6; Dougall v. Schulenberg, 101 Cal. 154, 35 P. 635; McKee v. Dodd, 152 Cal. 637, 93 P. 854, 14 L.R.A.(N.S.) 780, 125 Am.St.Rep. 82."

In view of the above-cited authorities it must be held that the fact that appellant did not enter this state until after the filing of the complaint is an immaterial factor.

[3] The appellant's second point is that section 351 of the Code of Civil Procedure does not operate in favor of a nonresident plaintiff. No provision of the statute is referred to upon which such a limitation can be predicated. It is appellant's theory that on general principles such a limitation should be read into the statute. Although there is some slight conflict in the authorities on this subject, the overwhelming weight of authority is that a statutory provision suspending the statute of limitations while defendant is a nonresident is not affected by the nonresidence of the party asserting the cause of action. There is an exhaustive annotation on this exact problem in 83 A.L.R. 271. At page 273 the majority rule, supported by the citation of many cases from fifteen different states, is stated to be as follows: "According to the weight of authority, in the absence of a statute to the contrary, a provision in a statute of limitations that the period of limitation upon a cause of action shall not be considered as running while the person against whom the cause exists is a nonresident, or without the state, must be given effect notwithstanding the nonresidence of the person in whose favor the cause exists."

Again, at page 274 of 83 A.L.R. it is stated: "The majority rule, as stated above, covers cases where neither the plaintiff nor the defendant was a resident of the forum at the time the cause of action accrued. Those cases obviously cover causes of action accruing in foreign jurisdictions."

California has at least inferentially aligned itself with the majority rule, because in McKee v. Dodd, supra, it was noted in the opinion (152 Cal., at page 639, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St. Rep. 82) that the plaintiff, who was a resident of New York at the time of the execution of the note, continued to reside there. Nevertheless, section 351 was held applicable.

One of the cases adopting the majority rule is Meyers v. Credit Lyonnais, 259 N.Y. 399, 182 N.E. 61, 83 A.L.R. 268, decided by the New York court of appeals. That case involved, as does the instant case, a nonresident plaintiff and a nonresident defendant, the action being brought on a foreign claim. Many cases are collected and commented on in that opinion upholding the majority rule.

The reasoning upon which the majority rule is predicated is sound. The cases adopting this rule point out that the statute makes no express exception of nonresident plaintiffs. For the courts to insert such a limitation would be to judicially legislate. Moreover, these cases point out, the courts should not discriminate against nonresident plaintiffs.

It is true that there are a few cases, mainly from New Jersey and Oregon, which have adopted the contrary view. See cases collected 83 A.L.R. 276. These cases are far in the minority, and, in our opinion, are unsound.

The contention made by appellant in the instant case that if California should adopt the majority rule it will result in a flood of foreign claims being sued on in this state, resulting in the overburdening of the local courts, is not convincing. In the many states that have adopted the majority rule there is nothing to indicate such a result. This same argument was advanced in several of the cases adopting the majority rule but those courts did not find it controlling. Hatch v. Spofford, 24 Conn. 432; Paine v. Drew, 44 N.H. 306. Moreover, section 361 of the Code of Civil Procedure, quoted supra, provides an ample safeguard against the enforcement of stale foreign claims in this state.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

37 Cal.App.2d 356

## LENIHAN v. BAGGIANI.

Civ. 6238.

District Court of Appeal, Third District, California.

Feb. 16, 1940.

**1. Appeal and error ⇐930(1)**

On appeal, evidence supporting or tending to support trial court's findings for plaintiff was accepted as true.

**2. Landlord and tenant ⇐223(7)**

Where lessor orally agreed to lease certain property to lessee with understanding that lease was to be reduced to writing and lessee went into possession, made improvements, and subsequently left the premises and did not return and was not prevented from returning to the premises by the lessor, in lessor's action for rent lessee was not entitled to reasonable value of improvements made by him on property on ground that lessor repudiated the lease.

---

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Timothy Lenihan against M. Baggiani for rental for realty and for electricity and pasturage, furnished defendant, wherein defendant filed cross-complaint. From a judgment for the plaintiff, defendant appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Grayson Price, of Chico, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to recover the sum of $900 as rental for real property; $24 paid for electricity furnished defendant; and $36 alleged to be due for pasturage furnished. Defendant, by cross-complaint, sought to recover the sum of $1,538.28 for improvements made upon the leased premises. Findings were made in favor of plaintiff upon all issues raised by the complaint, except that the claim for pasturage was disallowed. Upon the issues raised by the cross-complaint, all were decided adversely to defendant with the exception that defendant was allowed a credit of $60 for stock sold by plaintiff. Judgment was rendered in favor of plaintiff in the sum of $916.25, and defendant appeals therefrom.

Appellant does not question the finding as to the amount due under the allegations of the complaint, but claims that the trial court erred in refusing to allow him credit for improvements as set forth in the third count of the cross-complaint. The finding under attack here is as follows: "That except as in this paragraph expressly found to be true, each and every allegation contained in the third alleged cause of action and cross-complaint is untrue. That it is true that plaintiff and defendant entered into a verbal lease agreement which thereafter was to be reduced to a written lease, wherein and whereby the defendant rented certain peach and prune orchards of plaintiff on the property described in plaintiff's complaint, and the rental of the same was to be $900 for each year, payable before any of the crops were removed from said premises, the plaintiff to pay all taxes and assessments against the land, and defendant to have the privilege of making improvements on said premises with the consent of plaintiff and lessor. That defendant was authorized and permitted by plaintiff to construct and build a four-room dwelling upon said premises which was to be used by him. That defendant did expend the sum of $1050.00 in such construction. That it is true that defendant expended the sum of $368.41 in the grafting of walnut trees and replacing of new prune trees for old ones. That it is true that the defendant expended the sum of $119.87 in the construction of sulphur houses, sheds, and repair to fences and contouring orchard property. That the total expenditure made by defendant on said property was $1538.28. The court further finds that the rental charged previous years by plaintiff for said property was reduced to compensate for the improvements to be made thereon by defendant. The court further finds that the construction of the house on said premises was for the sole use and benefit of defendant. That said expenditures and improvements created no obligation on defendant."

Other findings to the effect that plaintiff did not repudiate the lease or eject defendant from the premises or refuse to sign a written lease are also claimed to have no support in the evidence.

[1] The undisputed testimony shows that in January, 1936, plaintiff orally leased a sixty-acre fruit orchard to defendant, with the understanding that such agreement be later reduced to writing, but this was never done. There was one dwelling upon the premises, where plaintiff retained his residence. Defendant entered into possession, and proceeded to erect an addition to the dwelling at his own expense and for his own use as a place to live. The testimony in relation to the agreement covering the erection of these improvements is conflicting. Under the familiar rule that we must accept any evidence supporting, or tending to support the findings as true, it appears that plaintiff testified that defendant erected the addition to the dwelling, as the court found, "to accommodate himself". "He done it for his own benefit. He was renting a house other places and paying thirty dollars for rent." The finding "that the construction of the house on said premises was for the sole use and benefit of defendant; that said expenditures and improvements created no obligation upon defendant", appears to be supported by the record.

In the latter part of September, 1937, and about the time the complaint herein was filed, defendant left the premises, and according to the testimony of plaintiff, he did not return until a month prior to the trial, when he brought with him a second-hand man to whom he sold some furniture. Plaintiff testified that he never did anything to prevent defendant from returning to the premises; that he never told defendant that he could not come back; that no written lease was ever presented to him for execution by defendant, and that all he wanted was his rent.

The precise contention of appellant is set forth as follows: "Where a lessee is in possession of property under an oral five year lease with an agreement by the parties to execute a written lease for said period, and lessee, in reliance upon said lease agreement, makes improvements on said property, he may recover the reasonable value of the improvements made by him on said property where the lessor refuses to execute a written lease as agreed upon between the parties and orders the lessee off the premises within two years after the making of said oral lease."

[2] Appellant relies upon the case of Blank v. Rodgers, 82 Cal.App. 35, 255 P. 235, where the facts are somewhat similar. In that case, however, the undisputed facts showed that the lessor had *repudiated* the oral agreement by serving a notice to quit the premises. The rule laid down in 27 C. J., at page 364, states that a recovery can be had under such circumstances, where the agreement is subsequently *repudiated* by the owner. The trial court here found in effect, that there was no *repudiation* of the lease by the lessor, and there is substantial evidence to sustain that finding. It is nowhere urged by appellant that the mere filing of an action to recover rent constitutes a repudiation of the lease. Such an action is distinguishable from an action for breach of the contract by a lessee. 36 C. J., p. 398, § 1313. There may be some other remedy available to appellant, but he is foreclosed here by findings which have substantial evidentiary support. This applies not only to the terms of the oral lease, but also to the subsequent acts and conduct of the parties.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.




37 Cal.App.2d 419

**BERKOWITZ et al. v. KIENER CO. et al.**

**Civ. 6334.**

District Court of Appeal, Third District, California.

Feb. 21, 1940.

Rehearing Denied March 22, 1940.

Hearing Denied April 18, 1940.

**1. Brokers ⇐86(1)**

In action against agent for owner of lots to recover commissions for sale thereof based in part on action of agent in securing cancellation of contracts obtained by brokers and allowing credit on new contracts for payments made under prior contracts, for purpose of depriving brokers of commission, evidence sustained recovery.

**2. Appeal and error ⇐1030**

In action for commissions, dividing accounting period was not prejudicial, in view of finding that nothing was owing for first

division, and would not be regarded as arbitrary in absence of attack on such finding.

**3. Reference ⇐20**

In action for commissions, whether reference of accounting to an accountant was required was in trial court's discretion, and refusal to grant request for such reference was not error. Code Civ.Proc. § 639.

**4. New trial ⇐99**

New trials on ground of newly discovered evidence are not favored, and even where the showing is apparently a strong one, much depends upon sound discretion of trial judge.

**5. New trial ⇐104(1), 105**

The new evidence upon which new trial is sought must be evidence that is new and not cumulative, or solely of an impeaching character.

**6. New trial ⇐108(1)**

A new trial on ground of newly discovered evidence will not be granted if it appears that a different judgment would not necessarily result from the new evidence if presented.

**7. New trial ⇐102(1)**

It must appear that the new evidence on which motion for new trial is based could not, with reasonable diligence, have been obtained at the trial.

**8. New trial ⇐99**

In action for commissions, denial of motion for new trial based on alleged newly discovered evidence consisting of the report of a certified public accountant was not an abuse of discretion.

---

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by William B. Berkowitz and another against the Kiener Company, Harry Kiener, and another for commissions alleged to be due under the terms of a written contract. Upon trial, the other defendant joined with plaintiffs in prosecuting the action. Judgment for plaintiffs and the other defendant against the named defendants, and the named defendants appeal.

Affirmed.

Pacht, Pelton, Warne & Black and Alfred P. Chamie, all of Los Angeles, for appellants.

Eugene L. Wolver, of Los Angeles, for respondents.

Louis Greenbaum, of Los Angeles, for defendant Bank.

SCHOTTKY, Justice pro tem., delivered the opinion of the court.

Plaintiffs sued to recover moneys alleged to be due to them and defendant Elliott M. Bank from defendants, The Kiener Company and Harry Kiener, for commissions due under the terms of a written contract entered into between the defendant, The Kiener Company, and plaintiffs, and defendant, Elliott M. Bank, while doing business under the fictitious name of Sutton & Co. and also on an oral contract between the defendant, The Kiener Company, and plaintiffs, while plaintiffs were doing business under the name of Berkowitz Brothers.

Plaintiffs sought recovery upon the common counts of money had and received and money due upon contract in the first and second causes of action; and in the third cause of action plaintiffs made a demand for an accounting, and in the fourth cause of action plaintiffs sought further recovery from defendants, The Kiener Company and Harry Kiener, upon the ground that said defendants had made certain contracts of purchase secured by plaintiffs impossible of performance.

The defendants, The Kiener Company and Harry Kiener, denied the material allegations of the complaint, and the defendant, Elliott M. Bank, who was joined as defendant, with the allegation that he was so joined because he would not join as plaintiff, filed an answer alleging his willingness to join with plaintiffs in said action, and at the trial said defendant, Elliott M. Bank, joined with plaintiffs in prosecuting said action.

The trial court found that plaintiffs and defendant, Elliott M. Bank, doing business as Sutton & Co., were entitled to judgment against defendant, The Kiener Company, in the sum of $9,687.80, less a set-off of $5,040.94, to which said defendant was entitled, leaving a balance of $4,646.86; and the court further found that there was due from the defendant, The Kiener Company, to plaintiffs, doing business as Berkowitz Brothers, the further sum of $2,210.90, less a set-off of $79.15, leaving a balance of $2,131.75. Judgment followed in accord-

ance with said findings, and this appeal is from said judgment.

A summary of the facts as shown by the evidence and found by the court are as follows:

On the 1st day of June, 1928, the plaintiffs and the defendant, Elliott M. Bank, copartners doing business under the name of Sutton & Co., entered into a written agreement, whereby Sutton & Co. were to sell exclusively certain lots owned by the Big Bear Land & Water Co., for which company the defendant, The Kiener Company, was the exclusive agent. Under the terms of the agreement, Sutton & Co. was to receive the first 40 per cent of a list price, The Kiener Company the next 60 per cent, and all moneys above the list price were to be paid to Sutton & Co. Where the sale price of the contract was less than the list price, the computations of commissions were to be based upon the sales price. Sutton & Co. commenced operations under said agreement, and through its members and agents made certain contracts.

On September 21, 1928, the agreement of June 1, 1928, was terminated by written cancelation of agreement wherein it was provided that the liability of defendant, The Kiener Company, to make the payments of money and commissions earned by Sutton & Co. under the terms of the former agreement, would thereafter continue. At the same time a written dissolution of agreement was entered into, wherein the copartnership theretofore existing between plaintiffs and defendant, Elliott M. Bank, was terminated, and the accounts receivable were assigned to the defendant, Harry Kiener, as trustee, for the purpose of paying the salesmen's commissions and accounts payable, and allocating the balance between the plaintiffs and defendant, Elliott M. Bank. This instrument was prepared, as were all others, by the attorney for defendants.

Immediately after the dissolution, the plaintiffs and the defendant, The Kiener Company, entered into an oral agreement, which said defendant agreed to reduce to writing, upon the same terms and conditions as the prior agreement of June 1, 1928, and plaintiffs as copartners under the name of Berkowitz Bros., thereafter through themselves and their salesmen, made additional contracts. Subsequently, and about December 15, 1928, plaintiffs discontinued operations, and instructed defendants to pay their salesmen out of the contingent commissions. Such a similar prior instruction had been made in regard to the salesmen of Sutton & Co.

After the discontinuance of the activities of Berkowitz Bros. the defendant, The Kiener Company, through its salesmen and agents, solicited various of the vendees under the contracts, while said vendees were not in default upon said contracts, to purchase lands other than that contained in their respective contracts, and agreed with said various vendees that if said vendees purchased other lands The Kiener Company would cancel the then existing contracts obtained by plaintiffs and defendant, Elliott M. Bank, and allow full credit on the new contracts for all payments made under the prior contract. Pursuant to such agreement various of said contracts were canceled, and new contracts entered into by said vendees with The Kiener Company. The trial court found that these transfers were made by The Kiener Company through its agents, for the purpose of depriving plaintiffs and defendant, Elliott M. Bank, doing business as Sutton & Co., and plaintiffs, doing business as Berkowitz Bros., of the commissions, including coverage, that would become due to them upon the payment of the further instalments of the purchase price, and that the defendants thereby made impossible and prevented the further performance of said various contracts, and that plaintiffs and defendant, Elliott M. Bank, doing business as Sutton & Co. and plaintiffs, doing business as Berkowitz Bros. were respectively entitled to $3,084.35 and $1,085, because of the switching and transferring of said contracts obtained by them. The court found that said plaintiffs and Elliott M. Bank were entitled to further sums totaling the amounts for which judgment was rendered.

Appellants set forth in their opening brief four points upon which their appeal is based. These are: 1. The evidence is insufficient to support the basic findings relating to the accounting made by the court of the amounts due to plaintiff and defendant Elliott M. Bank by The Kiener Company. 2. The court erred in arbitrarily dividing the accounting period. 3. The court erred in not referring the account problem to a qualified accountant. 4. The court erred in refusing to grant defendant's motion for a new trial on an accounting.

[1] In support of their first point appellants devote some fifty pages of their opening brief to an attack on twelve separate findings of the trial court. In order to properly understand and fully consider the contentions of appellants, we have carefully read the reporter's transcript, consisting of 789 pages, the clerk's transcript, consisting of 145 pages, and some fifty exhibits, and we cannot refrain from stating that in view of the fact that the principal contention of appellants is that the evidence does not support the findings of the trial court, an appellate tribunal should not be burdened with the task of reviewing such a record when it appears as clearly as it does in this case that there is substantial conflict in the evidence.

It would serve no useful purpose to discuss the attack of appellants on each of the twelve findings attacked by them. We will, however, discuss their first contention that finding XI, wherein the trial court found that the transfers referred to were made by defendants "for the purpose of depriving the plaintiffs and the defendant Elliott M. Bank, doing business as Sutton & Co., and the plaintiffs, doing business as Berkowitz Bros., respectively, of their respective commissions, including overage, that would thereafter become due to them upon the payment of the contingent instalments of the unpaid purchase price of said various respective contracts of said various vendees" is not supported by the evidence, as fairly illustrative of the force of the argument of appellants as to the insufficiency of the evidence to support the finding attacked by them.

In support of such contention, appellants quote the testimony of Harry Kiener, president of The Kiener Company, in which said defendant denied that The Kiener Company ever participated in or caused any cancelation or reloads to be made of any contracts originally procured by Sutton & Co. and by Berkowitz Bros. for the purpose of terminating and defeating the claims of plaintiffs and Elliott M. Bank. Appellants assert that this testimony of Harry Kiener is uncontradicted and state that "there is absolutely no evidence in the record to the effect that the transfer upon any of the related contracts was made for the purpose stated in the above Finding".

It appears from the record that the contracts, the performance of which the court found was made impossible by defendants, at the time they were transferred, were not in default, were transferred at the solicitation of employees of defendants, and that full credit was allowed on the new contracts for all payments made on the prior contracts. It appeared further that this was done in so many instances that it was only reasonable to infer that it was done as a part of a premeditated plan. Numerous witnesses testified as to the statements and promises made to them by The Kiener Company's salesmen in their efforts to switch the purchasers from the old contracts to new contracts for other property, and the findings of the trial court that such conduct of the agents of said defendant was for the purpose of depriving respondents of their respective commissions is amply supported by the evidence.

We will not discuss the attack of appellants upon Findings XII, XIII, XIV, XV, XXI, XXXIII, XXXIV, XXXVI, LI, XXXIX, XLII, because we are convinced from our review of the record that the evidence amply sustains such findings. "In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158.

[2] The second point urged by appellants is that the trial court erred in arbitrarily dividing the accounting period, and in commencing its account as of September 21, 1928. Plaintiffs' complaint contained in addition to the causes of action for an accounting, causes of action for money had and received. The court found in finding XVII "that on the date of the dissolution of Sutton & Co., to-wit, September 21, 1928, the plaintiffs and defendant Elliott M. Bank, had been paid in full for all commissions, including overage, then due them", and the court then proceeded to determine by the accounting what sums became due thereafter. Certainly appellants could not be injured by a finding that they had paid plaintiffs and defendant Elliott M. Bank in full up to September 21, 1928, and there could be nothing arbitrary in the action of the trial court in so dividing the accounting period, particularly in view of the fact that such finding XVII is not attacked by appellants.

[3] Appellants in their oral argument seemed to rely chiefly upon the third point in their opening brief, which is that "the court erred in not referring the accounting problem to a qualified accountant". Appellants assert upon this point: "The present accounting is exceedingly complicated and involved. It was error for the court, at the time of the trial, to have refused defendants' application to send the matter to an accountant for an independent audit."

Section 639 of our Code of Civil Procedure provides that the trial court in certain cases may appoint a referee for the taking of an accounting, but there is nothing in said section, or in any decision of our appellate courts, which makes it mandatory for the court to order such reference. Appellants cite some cases from other jurisdictions which seem to hold that it was error in certain cases for a court to deny a reference, but these cases are clearly against the weight of authority. The true rule is clearly set forth in 10 Ruling Case Law at page 510, as follows: "Inasmuch as references are ordered merely as an aid and assistance to the court, a reference is not necessary and may be dispensed with in any case where the court can get along well enough without it. Ordering a reference is therefore a matter of discretion. A reference will not be ordered even in a matter of account where the transaction to be considered is short and in no respect complex, and it is ordinarily within the discretion of the court, if for any reason it deems it proper to do so, to state the account itself, after an examination of the testimony. Questions fit for reference will be determined by the court itself without a reference, whenever it can conveniently do so, to the saving of time and expense."

That this is the rule in California is shown by the following cases: Emery v. Mason, 75 Cal. 222, 16 P. 894; Fox v. Hall, 164 Cal. 287, 128 P. 749; Putman v. Superior Court, 209 Cal. 223, 286 P. 425.

We conclude, therefore, that it was a matter entirely within the discretion of the trial court to determine whether it was necessary to refer the accounting to an accountant, and that there was no error in refusing to grant appellants' request for such reference. The trial court may well have concluded from the evidence in this case that reference to an accountant would not help the court in a correct determination of the issues involved.

[4-8] There is no merit in appellants' final contention that the trial court erred in denying appellants' motion for a new trial. Appellants admit that the report of Rothman & Rothman, certified public accountants, which was attached to the affidavit of Harry Kiener, filed in support of defendants' motion for a new trial, was newly-discovered evidence which showed the finding of the trial court to be in error. We do not see how such a report could be considered newly-discovered evidence, but even if it should be so considered, we cannot see that the trial court abused its discretion in denying appellants' motion for a new trial.

It is axiomatic that new trials on the ground of newly-discovered evidence are not favored, and it is also true that even where the showing is apparently a strong one, much depends upon the sound discretion of the trial judge. United States v. Meldrum, D.C., 146 F. 390, 392; Estate of Bainbridge, 169 Cal. 166, 146 P. 427; Spiers v. Spiers, 176 Cal. 557, 169 P. 73; 1 Spelling's New Trial and Appellate Practice 409; 4 Cor.Jur. 833. It is also required that the new evidence upon which a new trial is sought must be evidence that is new and not cumulative, or solely of an impeaching character. Likewise it is true that a new trial would not be warranted on this ground where it is made to appear that a different judgment would not necessarily result from the new evidence if presented.

And, lastly, and perhaps most important in order to warrant the granting of a new trial on this ground, it must appear that the evidence thus offered is evidence that could not, with reasonable diligence, have been obtainable at the trial. People v. Byrne, 160 Cal. 217, 116 P. 521; Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127; Arnold v. Skaggs, 35 Cal. 684, 688; Taber v. Beske, 182 Cal. 214, 187 P. 746; Lawrence v. Pickwick Stages, 68 Cal.App. 494, 229 P. 885; Monnette v. Title Ins., etc., Co., 107 Cal.App. 313, 324, 290 P. 668.

The judgment is affirmed.

We concur: PULLEN, P. J; TUTTLE, J.

37 Cal.App.2d 381

**O'BRIEN v. MARKHAM et al.**

Civ. 6396.

District Court of Appeal, Third District, California.

Feb. 19, 1940.

Hearing Denied April 18, 1940.

**1. Wills ⇐421**

Ordinarily, if no contest is filed to a will before its admission to probate, or within the statutory time thereafter, the order admitting the will to probate becomes and remains "res judicata" and the will cannot be set aside. Probate Code, §§ 370, 380.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

**2. Trusts ⇐110**

Where will had been admitted to probate and time to contest had expired, burden was upon plaintiff, seeking to have beneficiaries declared involuntary trustees for plaintiff's benefit, to first establish that by extrinsic fraud plaintiff was prevented from contesting will within statutory time, and, if successful therein, plaintiff could then offer proof pertaining to question of validity of will. Probate Code, §§ 370, 380.

**3. Attorney and client ⇐104**

Knowledge of plaintiff's attorneys with respect to matters concerning the execution of a will would be imputed to plaintiff.

**4. Appeal and error ⇐931(1), 1010(1)**

Every intendment is in favor of the finding as made by trial court, and it will not be set aside unless it is plain to a reviewing court that the conclusion cannot be supported on any rational view of testimony.

**5. Trusts ⇐110**

In suit to have beneficiaries under will declared involuntary trustees for plaintiff's benefit, where will had been admitted to probate, and time to contest had expired, plaintiff was not entitled to relief where evidence showed that testator was not acting under fraud or undue influence at time of executing will and that essential facts were known to plaintiff within six months from date when will was admitted to probate; it being immaterial that testator's attorney and attorney's wife failed to remember certain details while testifying and that there might have been a lack of affection between testator and attorney's children who benefited under will. Probate Code, §§ 370, 380.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Suit in equity by Maude Lillian O'Brien against Blanche C. Markham, executrix of the estate of William F. Markham, deceased, and others, to impress a trust in favor of plaintiff to the extent of a one-third interest in deceased's estate. From an adverse judgment, plaintiff appeals.

Affirmed.

Neblett, Warner & MacDonald, R. Dean Warner, Alfred F. MacDonald, E. Walter Guthrie, and William H. Neblett, all of Los Angeles, for appellant.

Harlan G. Palmer, of Hollywood, Sparling & Teel and Jennings & Belcher, all of Los Angeles, Hahn & Hahn, Joseph G. Pyle, all of Pasadena, and Wendell P. Hubbard, of Los Angeles, for respondents.

J. H. O'Connor, Co. Counsel, Ernest and Purdum, Deputy Co. Counsel, both of Los Angeles (Louis E. Kearney, of Los Angeles, of counsel), for administrator.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action in equity against the beneficiaries named in the will of William F. Markham, deceased, to impress a trust in favor of plaintiff, who is seeking to have such beneficiaries declared to be involuntary trustees to the extent of a one-third interest in the estate of William F. Markham, as soon as the same is distributed to them.

The deceased executed his last will and testament on March 4, 1930. He died on April 30, 1930. The will was admitted to probate on May 22, 1930, and this action was commenced January 8, 1937.

The action is based upon the ground that the will was procured by fraud and undue influence exerted upon testator by his attorney Harlan G. Palmer. The case was tried without a jury, and at the conclusion thereof, the court held that at the time of the execution of his last will, deceased was not acting under fraud or undue influence and that the facts here relied upon were known to the plaintiff within six months of the date when the will was admitted to probate. The court further found that the plaintiff was estopped from maintaining

this action because she received and retained moneys paid to her pursuant to the terms of the will, and had not, prior to bringing this action, offered to restore the same. The court further found that the plaintiff was guilty of laches, and also that her cause of action was barred by the statute of limitations. From this judgment this appeal is taken.

As grounds for such appeal it is urged that the evidence was insufficient to support the finding that at the time of the execution of his will, William F. Markham was not acting under duress, menace, fraud or undue influence, and that the essential facts were known to plaintiff within six months from the date when the will was admitted to probate; and that the court erred in its finding as to estoppel by reason of plaintiff's having received and retained certain moneys and also as to laches and the statute of limitations. From our study of this case it will not be necessary to consider these latter grounds of appeal, as we are basing our conclusions upon the first two points only, which we believe are conclusive. The record discloses that when William F. Markham executed his last will and testament he was then seventy-nine years of age, and had been suffering for some weeks prior thereto with an ailment for which he was taken to a hospital where, after observation, an operation was performed on the 29th day of April, and he died the following day.

Mr. Markham left surviving, his widow, Blanche C. Markham; a son, Leigh M. Markham, and a daughter Maude Lillian O'Brien, the children of a prior marriage, the latter being the plaintiff and appellant herein.

The deceased left an estate which was appraised at approximately two million dollars. By his will he left the widow, Blanche C. Markham, the estate for her life, subject to bequests of $100 a month to a sister; $250 a month to Ben E. Sprague, an old friend; to his gardener Ed. Jenkins $150 a month as long as he was employed for the estate; to a niece $150 a month, and to E. S. Roe, a foreman in the factory the deceased once owned and operated in Michigan, $150 a month; also out of the estate was to be paid to the plaintiff Maude Lillian O'Brien, the daughter, $250 a month during her lifetime, and a like amount to a son, Leigh H. Markham, during his lifetime. All of the residue and accumulated income was, upon the death of the wife, to go to the four children of Harlan G. Palmer and his wife, share and share alike.

Markham at one time lived in Michigan, but in 1911 disposed of his interests there and moved to Southern California. His wife died, and in June, 1911, he married Blanche C. Markham, which marriage continued until the death of Markham. Shortly after Mr. andMrs. Markham had established their residence in Hollywood, California, they became acquainted with Harlan G. Palmer.

Harlan G. Palmer married Ethel Hunkins in 1915, and she also became acquainted with Mr. and Mrs. Markham. Four children were born to Mr. and Mrs. Palmer. For a number of years the two families lived almost across the street from each other, and frequently visited back and forth. They often had dinners together, and as the children grew they frequently visited the Markhams and played about the yard and in the house. In 1924 the Palmers moved a few blocks away, and their visits were somewhat less frequent, and in 1926 Mr. and Mrs. Markham moved to Glendale, and from that time on their visits were only about once a month. On one occasion the Markhams spent a week end with the Palmers at their summer cabin at Malibou lake. From about 1911 when Palmer met Mr. Markham and until the death of the latter in 1930, Mr. Palmer was Markham's personal attorney in a number of matters.

In 1928 Mr. and Mrs. Markham gave to Mr. and Mrs. Palmer the sum of $1,000, to be invested for the benefit of the four Palmer children. In the meantime it appears that the relationship between William F. Markham and his son and daughter was not the most cordial. In 1920 Markham invited the daughter to establish her home in California, but she remained only about three months and returned to Michigan. About 1920 Leigh H. Markham, the son, came to California to make his home, but for some reason, not entirely clear, in 1926 or 1927, he returned to his former home in Michigan, and neither plaintiff nor her brother thereafter came to California, until the son returned to attend his father's funeral, and plaintiff came to California in the latter part of 1936, some time after her father's death.

In regard to the matter of the testator's intention to execute a will, we find that on January 25, 1930, Palmer received a let-

ter written by Blanche C. Markham, at her husband's dictation. This letter stated, in effect, that for some three or four months past he and his wife had been considering the disposition of their property, and suggested that Palmer call upon them at his convenience and discuss with them the preparation of a will. Thereafter, one evening Mr. and Mrs. Palmer went to the Markham home in Glendale, where Mr. and Mrs. Markham, in the presence of Mr. and Mrs. Palmer discussed their will, and where Mr. Markham then told Mr. and Mrs. Palmer that the Markhams had decided to dispose of their property so as to take care of their friends and relations, with the remainder to the four Palmer children.

Some two or three weeks later Mr. and Mrs. Markham went to Mr. Palmer's office, where Mr. Markham delivered a written memorandum in his own handwriting, to Mr. Palmer, stating it represented the Markhams' desires in connection with the will. After some discussion of the provisions of the will Mr. and Mrs. Markham left. Thereafter Mr. Palmer called on Mr. Markham to discuss with him certain details as to whether or not Mrs. Markham should have a certain income before any of the other beneficiaries were provided for, or whether her income should come out of the remainder of the estate. On March 2, or 3, 1930, the will was finally drawn up by Mr. Palmer and mailed to Markham. Mrs. Markham testified that she first saw the original will at the Markham home about the first day of March, 1930, and it was then in her husband's possession, he having received it through the mail. Mr. Markham read the will to her, and told her he thought he would have an attorney named Rushaupt come over and look at it. From a letter of Markham addressed to Palmer we have verification for this, inasmuch as Markham wrote that he had telephoned to a lawyer friend, Harry Rushaupt, and discussed certain provisions in the will with him.

On the 4th day of March, 1930, Mr. Markham, not having seen or corresponded with Mr. Palmer since the receipt of the will, except as just referred to, went to the office of Sarah E. Pollard, a notary public, with whom he was acquainted, and there in the presence of Miss Pollard and a Miss Johnson, and Mrs. Markham, executed the will with all of the formalities required by law. After the will was executed in Miss Pollard's office, Mr. and Mrs. Markham returned to their home, where Mr. Markham deposited the document in his safe, and it there remained until after the testator's funeral. There can be no serious attack made upon the mental or physical capacity of Markham at the time the will was executed. Letters were introduced written by Markham to his son and to his attorney, both before and after the execution of the will. These letters introduced by plaintiff would appear to be the work of a clear-minded, vigorous man who knew what he wanted.

Under date of January 25, 1930, Markham wrote to Palmer as follows: "For the past three or four months Blanche [his wife] and I have been seriously talking and thinking of the disposition of our property after we are through with it. * * * Now I am making this confession to you regarding my two children, Maude and Leigh." He then proceeded to give various reasons why he did not intend to leave any of his property to his two children. "Now we are desirous of making a date with you (no hurry) and talk the matter over and draw up my will. I know now just what we want, and we wish further to get your advice whether it is better for us to turn our property over to a bank in Trust, and we would like to arrange when we do get together to have at least a good hour or more that we would not be disturbed. * * *" This letter was not signed, but Mrs. Markham testified she wrote it at the dictation of her husband and that it was mailed either by herself or by Mr. Markham, and the lack of a signature was an oversight. Palmer testified he received the letter about the date it bore, and that he and Mrs. Palmer called upon the Markhams in response to that letter.

In a letter of March 4, 1930, addressed to Palmer, Markham refers to his health, stating he was nervous and unstrung. He stated the X-ray showed his kidneys were all right, and a blood test was O.K. He complained of a kidney trouble but said he had probably injured himself by walking too far on a recent hunting trip. He had called in a lawyer, Harry Rushaupt, he said, and asked his opinion about certain trust provisions in the will. He also discussed in this letter certain matters pertaining to his income report.

In other communications of early March, and one dated April 6th, to his son Leigh, Markham refers to his physical condition,

complaining of pain at times, and that he was under treatment by a doctor for probably a kidney or bladder disorder.

Ben E. Sprague, his chauffeur, testified to facts which indicated the mental and physical condition of Markham the latter part of April, 1930.

Sprague also testified that three or four weeks prior to January 25th Markham told Sprague he was going to give his property to Palmers' children. If given to his daughter she would, said Markham, buy a Rolls Royce, and raise hell and kill herself. If given to Leigh, he would build a church on every corner in Hollywood. "I am going to give them enough so they cannot starve. Let him work a little, I worked." "If I leave it to the Palmer children, Judge Palmer will take care of the estate, and if I let it go any other way there would not be any of them have $300.00 in five years. I want to keep it carefully and give it to somebody that will take care of it."

The historian at the hospital where the operation was performed testified as to the clear and intelligent history Markham was able to give to her. The testimony of Mrs. Markham also was to the effect that he was in good condition. There was nothing in the record upon which a finding could have been based that Markham was in such a mental or physical condition that would interfere with the execution of a valid will.

Within a very few days after the death of Markham, Maude Lillian O'Brien, appellant herein, received a copy of the will. On May 20, 1930, less than three weeks after the death of William F. Markham, Mrs. O'Brien took up the matter of protecting her interests in the estate with Mr. Voorhies, a member of a law firm in Detroit, who entered into communication with the firm of O'Melveny, Tuller & Myers of Los Angeles, one of the outstanding law firms of California, and the matter of contesting the will and the facts surrounding its preparation and execution were considered.

On September 4, 1930, Mr. Voorhies, acting as attorney for appellant, came to California, and met with Mr. O'Melveny and Mr. Tuller, and while in California Mr. Voorhies and Mr. O'Melveny personally met Mr. Palmer and discussed with him the drafting of the will and its contents. After returning to Detroit, Mr. Voorhies advised Mrs. O'Brien that in his opinion, as was also the opinion of Mr. O'Melveny, that it would be for her best interest not to contest the will of the deceased. Through her attorneys she filed in the estate, a request for notice of proceedings as provided by section 1380 of the Code of Civil Procedure, and Mrs. O'Brien was kept informed of all steps taken in the Markham estate.

Immediately after the death of her father Mrs. O'Brien received a monthly check of $250 as provided in the will until on or about October 1, 1936, when a check in the sum of $250 which had been forwarded to her was returned without being cashed, and no further payments from that date have been made to Mrs. O'Brien from the funds of the estate.

The foregoing represents the essential facts in the case.

Section 370 of the Probate Code, enacted in 1931, and based upon former section 1307 and the first two paragraphs of former section 1312 of the Code of Civil Procedure govern the filing of contests of wills before their admission to probate. Section 380 of the Probate Code, enacted in 1931, is based upon former section 1327 of the Code of Civil Procedure, and governs contests after the will is admitted to probate.

In Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117, the court, in considering the effect of offering a will for probate, points out that the proponents thereby tender to the world the issue as to its genuineness, and unless one has been prevented from so appearing and contesting, by some fraud of those procuring the probate, he must be concluded by the decree as to any matter concerning which he could have obtained relief by a contest. It is no excuse for his failure to appear and contend, it is there held, that he did not know the alleged will was not genuine, that being one of the issues tendered by the sponsor of the will.

[1] Many authorities establish the rule to be that if no contest is filed to a will before its admission to probate, or within the statutory time thereafter, the order admitting the will to probate becomes and remains res adjudicata and is impervious to any assault and the will cannot be set aside. In re Maxwell, 74 Cal. 384, 16 P.

206; Estate of Smith, 214 Cal. 50, 3 P.2d 921; Estate of Bloom, 213 Cal. 575, 2 P.2d 753.

[2] This rule is admitted by appellant but she bases her cause of action upon the principle that even though a will has been admitted to probate and the time to contest has expired, nevertheless an interested party, who has by active extrinsic fraud been prevented from contesting the will, may seek the aid of equity, not to set aside the will, nor the order admitting it to probate, but to have the beneficiary under the will declare a trustee for the person so injured by the extrinsic fraud. This rule is clearly laid down in Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 762, 88 A.L.R. 1194. As there announced the plaintiff must first prove that by extrinsic fraud she was prevented from contesting her father's will. If she can do so, *then*, as the court said, she is entitled to consideration of her claim that the will was procured by undue influence. It would therefore appear that the burden was first upon plaintiff to establish that by such extrinsic fraud she was prevented from contesting the will within the statutory time, and if successful in that, she may then offer proof pertaining to the question of the validity of the will. Putting it more succinctly we quote from Caldwell v. Taylor, supra: "We are, therefore, of the opinion that if plaintiff upon a trial of this issue is able to prove that in fact by such fraud he was prevented from adequately and fully presenting his contest of his father's will, *then* he is entitled to a consideration by the court of the question of whether or not the will was in fact procured by the fraud of the beneficiary, as alleged in his complaint, which question has been heretofore foreclosed to him by the order admitting the will to probate." (Emphasis added.)

The appellant did not present these two elements separately, and the trial court permitted her tc introduce her entire case and then ruled upon the whole matter treating the authenticity of the will and the question of extrinsic fraud together.

Analyzing, however, the two elements separately and in the order prescribed by Caldwell v. Taylor, supra, we find that appellant presents the following as facts which she claims prevented her from learning of the undue influence until after the contest period had expired. First, she claims that she was ill most of the time for the nine months before her father's death, and was ill for over two years after he died, and was confined to her home in Detroit, Michigan. She next points out that she retained a lawyer and in October, 1930, directed that he come to California to investigate the possibilities of a successful contest of the will, and that upon his return from California this attorney advised her it would be for her best interest not to bring a contest of the will. She next states that her attorney reported to her that he had a conversation with Mr. Palmer wherein Mr. Palmer told him that her father was in "pretty good health" and that he had things just as he wanted it, and that he also reported to her that her father was in good physical condition on March 4th, the date of the execution of the will. She also stated that her attorney told her that Mr. Palmer had told him that Mr. Markham drafted this will, and that the will was in his own handwriting.

We do not find in the testimony of Mr. Voorhies that he told appellant that Palmer told him that Markham drafted the will. That is merely what appellant says that Voorhies told her. Mr. O'Melveny, who was present at all of the meetings between Voorhies and Palmer, testified positively that Palmer told Mr. Voorhies and himself that he, Palmer had, himself, drafted the will from a memorandum in Markham's handwriting.

[3] Mr. O'Melveny testified that Mr. Palmer had told Mr. Voorhies and himself that he (Palmer) had drawn the will, but that it had been prepared from a written memorandum in Mr. Markham's handwriting directing how Palmer should draw the will. This written memorandum was not asked for, but at that time appellant learned of its existence, which was some time before the expiration of the time for the contest of the will. We need cite no authorities here to the point that what her attorneys knew appellant knew. Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Nelson v. Nelson, 131 Cal.App. 126, 20 P.2d 995.

It is to be noted that appellant conceded that Mr. Palmer said Mr. Markham was in "pretty good health". Appellant knew, at least immediately after the death of her father, that he died in a hospital and had been there for about a week prior to his death. She also knew from what Mr. Pal-

mer told her attorneys that he was Mr. Markham's personal attorney.

Inasmuch as appellant abandoned any claim of incompetency of the testator to execute a will, the questions as to his health are not material. There was ample evidence in the hands of the attorneys for appellant, however, in the form of communications between Markham and his son in regard to the health and physical condition of the father. There was ample independent evidence that Mr. Markham was an active and vigorous man, and that his ailment for which he was operated upon, and from the shock of which he subsequently died, had no effect whatever upon his mental condition or his capacity to execute a valid will. It is to be remembered that about a month before the will was executed Markham had gone on a hunting trip, walking, as he himself said, about twenty miles.

Do the foregoing facts suggest fraud? Appellant received a telegram the following day telling her of the death of her father, and subsequently a letter from the widow describing the funeral. Under date of April 9th, is a letter from Mrs. Markham to appellant to which is added a postscript, "Your father is much better". In a letter of May 5th, from Mrs. Markham to appellant, telling her of the last days of Mr. Markham, the letter states: "He told Judge Palmer the night before that he had everything arranged just as he wanted it and he was not afraid." Also, within five days after the death of Markham, appellant received a carbon copy of the will. She also received notice of the offering of the will for probate. Mr. Leigh Markham came to California from Michigan and attended the funeral of his father. Before returning to Detroit he discussed the provisions of the will with Palmer and was advised by him to consult an attorney, which he did, calling upon Mr. Nathan Newby, Jr., an able and experienced lawyer, with whom he discussed the will upon several occasions. After his return to Michigan he had an interview with Mr. Voorhies, the attorney for appellant, in the presence of Mr. Voorhies, Mrs. O'Brien, the appellant, her husband, Leigh Markham and his wife. Subsequently he had other conversations with Mr. Voorhies, at some of which his sister was present. He also gave Mr. Voorhies at that time four letters or telegrams written in March, 1930, pertaining to the health of Markham.

Mr. Voorhies spent the greater part of a week in Los Angeles investigating the facts surrounding the Markham will sometime about the 20th of October, 1930. He saw Mr. Palmer and had at least one discussion with him in the presence of Mr. O'Melveny. Mr. Palmer stated he had been the personal attorney for Mr. Markham, but had not been a party in any way to what Mr. Markham wanted. He also said Mr. Markham's physical condition was not exactly normal but he was in apparent good health and sound mentally.

Mr. O'Melveny testified that Palmer said that at the time the will was executed Markham was not entirely well physically but was of sound mind and disposing memory; that Palmer stated he had drawn the will himself but that it had been drawn from a written memorandum in Mr. Markham's handwriting directing Palmer how he should draw the will so as to comport with Mr. Markham's desires. The written memorandum was not asked for nor produced. Palmer also said he had been Markham's personal attorney for many years.

Appellant claims that certain material facts were kept from her. She knew, however, that her father was over 79 years of age. She knew almost immediately that he died in a hospital. She received a copy of the will before it was admitted to probate, and from its face it appeared it was executed less than two months before his death, and that the Palmer children were the residuary legatees.

She also, through her attorneys, knew that Palmer was the draftsman of the will, prepared from a memorandum given him by her father, and that he had long been the attorney and personal friend of Markham, and from Palmer they knew her father, at the time of the execution of the will, "was not entirely well physically".

[4, 5] We fail to find any indication of extrinsic fraud in the statement or conduct of Palmer toward appellant. It is evident that before the expiration of the contest period the plaintiff either had actual knowledge of matters upon which her claim of undue influence is based, or implied knowledge of them through her attorneys. The trial court so found, and as

has often been said every intendment is in favor of the finding as made by the trial court, and it will not be set aside unless it is plain to a reviewing court that the conclusion cannot be supported on any rational view of the testimony. Lewis v. Lewis, 167 Cal. 732, 141 P. 367, 52 L.R.A.,N.S., 675. The testimony here fully supports the finding of the court.

It was next suggested that Mr. and Mrs. Palmer failed to remember certain details while testifying at the trial, and that there was a lack of affection and interest between Markham and the Palmer children. Neither one of these arguments can have any bearing upon the issue as to whether or not plaintiff was prevented from discovering facts sufficient to institute a will contest within the statutory period. We might, however, refer to the fact of the early acquaintance with the Palmer children, and that the Markhams gave to these children the sum of $1,000 a few years before the death of Mr. Markham, and that a short time before he executed his will he told Sprague that the Palmer children should not be disturbed in their play at the Markham home because the place would sometime belong to them. On March 4, 1930, Markham wrote to Palmer: "Now Pard, you and I must pull together because we have got four blessed children to consider and we take as much pleasure in thinking of their future as we do our present time."

Everything in the record bears out the finding of the trial court that Palmer did nothing to conceal or to misrepresent his activities or relationship in regard to the execution of the will. However, appellant, shortly after she received a copy of the will became sufficiently suspicious to engage an attorney and send him from Detroit to California to personally investigate the possibilities of a contest, and this attorney, in conjunction with one of the most reliable firms of lawyers in California, after investigation, and in at least two conferences with Palmer, found nothing to justify a contest. In fact we find no allegations in the complaint that Palmer or Mrs. Markham made any false or fraudulent representations to Markham while in his asserted weakened condition, or at any other time.

The question of estoppel by virtue of plaintiff having failed to restore certain monies paid to her out of the funds of the estate, and the plea of the statute of limitations, we do not consider, as we believe that what we have stated is sufficient to justify the conclusion of the trial court.

An examination of the entire record convinces us that plaintiff has failed to establish a case in equity, and that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.




37 Cal.App.2d 346

## VIGNE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12461.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1940.

1. Insane persons ⇐70

A will is not within purview of statute authorizing probate court to proceed against person suspected of possessing or knowing of any "instrument in writing" belonging to ward, such as insane person, in manner provided by statute respecting persons suspected of embezzling decedents' property, since "instrument in writing" means instrument, to possession of which, guardian is entitled as an asset or evidence of ward's title to property. Probate Code, §§ 613, 614, 1552.

[Ed. Note.—For other definitions of "Written Instrument," see Words & Phrases.]

2. Insane persons ⇐70

The probate court had no jurisdiction to order custodian of insane person's will to deliver it to such person's attorney, especially as such delivery might result in imposing heavy liability on custodian for damages because of failure to deliver will to Superior Court clerk in event of incompetent's death before his restoration to capacity. Probate Code, §§ 320, 321, 613, 614, 1552.

3. Insane persons ⇐26

In proceeding to compel custodian of will of one theretofore adjudged mentally incompetent to deliver it to attorney for

**incompetent and his guardians, probate court was without jurisdiction to pass on question of ward's sanity, as such adjudication fixed status of incompetency until restoration to capacity by procedure under statute providing for calling and examination of witnesses on hearing. Probate Code, §§ 613, 614, 1470, 1552.**

---

Proceeding in certiorari by Fernand Vigne, Jr., to annul an order of the Superior Court in and for the County of Los Angeles and Elliot Craig, Judge thereof, directing petitioner to deliver a will executed by Perry Whiting, an insane person, to his attorney.

Order annulled.

Robert E. McGurl, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Paul E. Iverson, all of Los Angeles, for respondents.

YORK, Presiding Justice.

The facts which form the basis of the instant proceeding in certiorari are as follows: On or about July 1, 1937, one Perry Whiting, president and founder of the Whiting-Mead Company of Los Angeles, executed his last will and for the purpose of safekeeping gave it into the possession of the petitioner herein, Fernand Vigne, Jr., one of the directors of said company and a beneficiary under the said will. On February 15, 1939, in a proceeding duly instituted therefor, said Perry Whiting was found by the Superior Court of Los Angeles County to be mentally disordered and was committed to the Baldy View Sanitarium, an institution for the mentally defective. Thereafter, on the 31st of July, 1939, said Whiting was adjudged incompetent to handle his person and property and Marita Whiting, his wife, and L. A. Iverson were duly appointed guardians of his person and estate by the Superior Court of Los Angeles County. On October 3, 1939, in a proceeding instituted under section 5100 of the Welfare and Institutions Code, said Whiting was declared insane and was committed to the state hospital for the insane at Camarillo, California.

Within one week of their appointment as such, the said guardians demanded of Fernand Vigne, Jr., that he deliver to them the last will of their said ward, which demand was refused. Thereupon, at the instance of said guardians, a citation was issued directed to the said custodian of the will to appear and show cause why he should not deliver the possession of the will to them. Upon hearing on August 15, 1939, this proceeding was dismissed upon the ground that the court had no jurisdiction to order the custodian of the will to deliver it to the guardians. On the same day, the said ward indited a letter to the custodian requesting him to deliver the will to his (the ward's) attorney, and on August 21, 1939, a second citation was issued under the provisions of section 1552 of the Probate Code, pursuant to a petition in which it was alleged that both the ward and his guardians had made demand upon the custodian to deliver the will to their attorney but that said demands had been refused. The hearing on the second citation and order to show cause was continued from September 19, 1939, to October 3, 1939, in order that the incompetent ward might be present for questioning. Thereafter the respondent court, sitting in probate, made the following findings of fact:

"I. That the petitioners Marita Whiting and L. A. Iverson are now the duly appointed and acting guardians of the person and estate of Perry Whiting.

"II. That Perry Whiting is now and was on August 15th, 1939, mentally sane, but is now and at said time was in need of medical care and controlled hospitalization in a sanatorium or other institution, for both his physical and mental condition.

"III. That prior to August 15th, 1939, both Perry Whiting and the petitioners requested Fernand Vigne, Jr., to deliver the last Will and Testament of Perry Whiting to his attorney Paul E. Iverson, and that on August 15th, 1939, Perry Whiting executed a letter in writing to Fernand Vigne, Jr., requesting him to deliver said last Will and Testament to Paul E. Iverson; that said letter was personally delivered to Fernand Vigne, Jr., on August 22, 1939; that on October 3rd, 1939, in open court, said Perry Whiting stated that he desired Fernand Vigne, Jr., to deliver his last Will and Testament to his attorney Paul E. Iverson.

"IV. That Fernand Vigne, Jr., now has in his possession or under his control, the last Will and Testament of Perry Whiting and has failed, neglected and refused to deliver the same to Paul E. Iverson, the attorney for Perry Whiting."

Pursuant to such findings of fact the following order was thereafter made and entered: "It is Hereby Ordered: 1. That the Citee, Fernand Vigne, Jr., deliver the last Will and Testament of Perry Whiting to his attorney, Paul E. Iverson, within ten (10) days from October 3rd, 1939. * * *"

By this proceeding in certiorari, the custodian of the will seeks to annul said order, contending in effect that under the provisions of sections 1552, 613 and 614 of the Probate Code (based upon sections 1800, 1459 and 1460 of the Code of Civil Procedure, respectively), the respondent court was without jurisdiction (1) to order the said custodian to deliver possession of the will to the ward's attorney, who is also the attorney for the guardians; (2) to determine questions of fact with regard to the right of possession of the will; (3) to pass upon the question of the sanity of the ward.

[1] In support of this theory petitioner cites the case of Mastick v. Superior Court, 94 Cal. 347, 349, 29 P. 869, 870, in which, under facts very similar to those in the instant case, the Supreme Court held that the phrase "instrument in writing", as used in section 1800 of the Code of Civil Procedure, "must be construed as referring to instruments to the possession of which the guardian is entitled as an asset or as evidence of his ward's title to property. The last will and testament of the ward is not an asset. Neither is it an instrument which the guardian could use in the recovery of an asset. It cannot in any way relate to any matter within his power or duties, or in any manner affect his action as a guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so; and we are unable to see upon what ground he is entitled to its possession, or to a knowledge of its contents. If it were in his hands, of course it would be his duty to preserve it; but here it appears that the maker of the will, before she became incompetent selected the petitioner as the custodian thereof, with special directions to retain the same until her death, unless she called for it, and upon her death to deliver it to her executor. The petitioner is charged with the execution of this trust. It is a trust which could be revoked only by Mrs. Langdon herself. * * * A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will. To hold that the subsequent incompetency of the maker of the will entitles the guardian to the possession of the instrument would defeat the evident purpose of the maker."

Respondents urge that at the time the Mastick case was decided section 1800 of the Code of Civil Procedure read as follows: "Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate * * * against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or *an instrument in writing belonging to the ward or to his estate,* the superior court, or a judge thereof, may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent"; that in 1931 when this section was added to the Probate Code, as section 1552 thereof, it was amended to read as follows: "Upon complaint under oath made by a guardian, ward, * * * that any person is suspected of having embezzled, concealed, smuggled or fraudulently disposed of any property of the ward, or *has in his possession or has knowledge of any instrument in writing belonging to the ward,* the court or judge may cite the suspected person to appear before the court, and may examine and proceed against him on such charge in the manner provided in this code with respect to persons suspected of having embezzled, concealed, smuggled, or fraudulently disposed of property of a decedent"; and that therefore, the legislature had in mind the decision in the Mastick case, and in making such change in the wording of the section thereby enlarged the jurisdiction of the probate court to include that and analogous situations. (Italics added.)

This court is not in accord with respondents' contention, for the very obvious reason that if the legislature, having in mind the decision in the Mastick case, had wished to include a last will and testament within the purview of said section 1552, supra, it would have worded the section accordingly.

The subject to which the said section relates is expressed in its title "Citation of

persons embezzling property of ward, etc."; and the procedure required to be followed against such persons is outlined in sections 613 and 614 of the Probate Code. With respect to the extent of the power given to the probate court by these sections, it is stated in 11a California Jurisprudence 463, section 338: "Speaking of what are now Probate Code sections 612-615, as one subject, the courts have said that the power of the probate court is analogous in its extent and object to the power exercised by courts of chancery upon bills of discovery, but this probate power and jurisdiction does not trench upon equity jurisdiction. *The power of the probate court ends with the discovery of the property* and the enforcement of the remedial provisions of the statute, and does not extend beyond that. (Doerber v. Superior Court, 57 Cal.App. 3, [206 P. 496].)" In the last cited case, it was said at page 34 of 57 Cal.App., 206 P. at page 497: "This proceeding was one purely in probate, ancillary and summary in its character, instituted for the purpose of the discovery of property, claimed as the property of the estate." (Italics added.)

In other words, the court has power under these sections of the code to cite and examine a person suspected of having in his possession or of having knowledge with respect to such documents and papers as are mentioned in section 613, supra. Upon examination, if it appear that the suspected person has such possession or such knowledge, the court may make an order requiring him to disclose his knowledge to the guardian, and may commit him to jail until such order is complied with.

[2] It therefore conclusively appears that the probate court acting under the authority of sections 1552, 613 and 614 of the Probate Code was without jurisdiction to order petitioner to deliver the last will and testament of the incompetent to his attorney. Moreover, the custodian of a will must respond in damages for failure to deliver the same to the clerk of the superior court "within thirty days after being informed that the maker thereof is dead"; consequently, a delivery, such as is here contemplated, might have the result of imposing a heavy liability upon petitioner in the event of the ward's death before his restoration to capacity. Secs. 320, 321 of the Probate Code; Snyder v. Security First National Bank, 31 Cal.App.2d 660, 88 P.2d 760.

[3] Likewise, the court was without jurisdiction to pass upon the question of the ward's sanity. It was judicially determined by the proceeding of July 31, 1939, for the appointment of guardians, that Perry Whiting was incompetent to handle his person and property. The effect of this determination is to fix the status of incompetency until such time as the said incompetent is again restored to capacity.

Quoting from 2 Freeman on Judgments, 5th Ed., section 902, the Supreme Court in the case of Hellman, etc., Bank v. Alden, 206 Cal. 592, at page 607, 275 P. 794, at page 801, stated: "It is said courts regard a '* * * statutory proceeding for the appointment of a guardian for the person and property of a lunatic or mentally incompetent person as a proceeding in rem, designed to determine the legal capacity of the alleged incompetent to make contracts and to manage and dispose of his estate; * * * the appointment of a guardian determines his status in this respect as against the whole world, and is ordinarily conclusive. * * *' Kellogg v. Cochran 87 Cal. 192, 196, 25 P. 677, 12 L.R.A. 104." See also Guardianship of Carniglia, 139 Cal.App. 629, 631, 34 P.2d 752.

Where such guardian has been appointed, "there is no method of restoration to capacity provided excepting by the procedure under section 1766, Code of Civil Procedure [now sec. 1470 of the Probate Code], and that section distinctly provides for the calling and examination of witnesses on the hearing, and, if it is found that the person is of sound mind, 'and capable of taking care of himself and his property, his restoration to capacity must be adjudged, and the guardianship of such person, if such person is not a minor, must cease.'" In re Des Granges, 102 Cal.App. 592, at page 599, 283 P. 103, at page 106.

For the foregoing reasons, the order under review is annulled.

We concur: DORAN, J.; WHITE, J.

## REIF v. SCHUMACKER et al.*

Civ. 10982.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1940.

Rehearing Granted March 23, 1940.

1. Master and servant ⇐276(1)

Evidence that switchman was injured while making up a freight train running between two points within the state, and that the train as finally made up contained an interstate car carrying merchandise in interstate commerce, authorized finding that switchman was engaged in "interstate commerce" at time of his injuries.

[Ed. Note.—For other definitions of "Interstate Commerce," see Words & Phrases.]

2. Master and servant ⇐276(8), 280

In switchman's action to recover from railroad for injuries suffered from fall from box car, evidence established that switchman was thrown from box car by a jerk caused by application of brakes on engine, which jerk was not reasonably to be anticipated and was made without warning.

3. Master and servant ⇐213(4)

Switchman did not assume the risk of being thrown from a box car by a sudden or negligent application of the brakes on engine.

4. Master and servant ⇐279(6)

Evidence establishing that common practice was to place a man on top of box car to set the brakes when train came to a stop, and that such practice was known to engineer and to entire train crew, established that engineer had knowledge of switchman's position on box car, and hence engineer was chargeable with negligence for sudden application of brakes.

5. Master and servant ⇐291(5)

In switchman's action for recovery from railroad for injuries suffered from being thrown from top of box car by sudden application of brakes on engine, refusal to instruct, that no negligence could be imputed to railroad unless it was shown that engineer knew switchman was on box car, was proper under evidence establishing common practice to place man on box car to set brakes which practice was known to engineer.

6. Damages ⇐130(2)

$20,000 damages for injuries to a 23-year-old switchman, consisting of a broken leg, an injury to nerve in left arm, and a stiffening of the ankle, were not excessive.

7. Appeal and error ⇐1004(1)

In order for reviewing court to modify an award of damages, verdict must be the result of passion or prejudice.

---

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by George K. Reif against Thomas Schumacker and Sidney M. Ehrman, trustees of the Western Pacific Railroad Company (a corporation), for injuries incurred in the course of plaintiff's employment as a switchman. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Edwin V. McKenzie, Ernest I. Spiegl, and Arthur B. Dunne, all of San Francisco, for appellants.

Goodman & Brownstone, of San Francisco, and Clifton Hildebrand, of Oakland, for respondent.

NOURSE, Presiding Justice.

The defendants appeal on a bill of exceptions from a judgment for plaintiff following a verdict for $20,000 for injuries incurred in the course of his employment as a switchman for the Western Pacific Railway. The defendants are trustees of the employer railroad corporation, pursuant to the provisions of section 77 of the National Bankruptcy Act, 11 U.S.C.A. § 205, and are sued in that capacity.

The plaintiff was injured when he fell from the lead end of a string of twelve box cars which were being pushed by an engine in the course of switching operations in the company's yard at Keddie, California. At the time of the accident plaintiff was walking along the top of the lead car preparing to set the brakes when the cars came to a stop. Application of the brakes on the engine caused the slack in the line of cars to run out, and this caused the lead car to stop suddenly, and plaintiff thereupon lost his balance and was thrown or fell from the car.

[1] Appellants state four issues as the questions involved on this appeal, which



*For subsequent opinion see 102 P.2d 375.

we will take in order. (1) Was plaintiff engaged in interstate commerce at the time he was injured? The particular movement was a switching operation in making up the "Keddie local", a freight train running between Keddie and Portola, both in California. As finally made up the train contained an interstate car carrying merchandise in interstate commerce. The parties are in disagreement as to when in these switching operations the "interstate" car was assigned to the train. Witnesses for both sides gave their several versions, and the jury accepted the testimony of those favorable to the employee; the trial court approved the finding in denying defendants' motion for a new trial, and that leaves nothing to be said here as to the nature of the employment at the time of the accident.

[2, 3] (2) Whether the evidence discloses that respondent was thrown by a jerk not reasonably to be anticipated, and without warning and whether he assumed the risk. Fellow employees of the respondent testified concerning the practice and custom in making similar switching operations and all agreed that the sudden application of the brakes made by the engineer would cause such a jerk of the lead car as could not have been anticipated by the respondent, and that no warning of such application was given.

The question of assumption of risk is settled in Devaney v. Atchison, etc., Ry. Co., 219 Cal. 487, 496, 27 P.2d 635, 638, where the Supreme Court held that "the employee does not assume the risk of being thrown off the top of a car by a negligent stop or an unusual stop of the violence indicated by the undisputed physical facts in the present case". There is no essential difference in the physical facts shown in the present case and those appearing in the Devaney case upon which the foregoing statement was based.

[4, 5] (3) Whether any negligence could be charged to appellant in view of the fact that the engineer did not know of respondent's position on the car. In this connection it is also argued that the trial court erred in refusing an instruction proposed by appellants that no negligence could be imputed to them unless it was shown that the engineer knew respondent was on the car. A sufficient answer to both arguments is that the respondent produced testimony, which the jury must have believed, that the common practice was to place a man on the car to set the brakes when the train came to a stop, and that this practice was known to the engineer and to the entire train crew.

[6, 7] (4) Finally appellants contend that the verdict of $20,000 is excessive. The respondent suffered a broken leg, an injury to the nerve in the left arm, and a stiffening of the ankle. There is nothing in the record which discloses any unusual passion or prejudice on the part of the jury. The defendants represented a large and unpopular corporation, the plaintiff was a young man of twenty-three years who was asking the jury for damages. Under modern decisions such a verdict would not per se support a conclusion that the verdict was the result of that "passion or prejudice" which is referred to in the decisions as necessary to support a modification by this court.

The judgment is affirmed.

I concur: STURTEVANT, J.

I concur in the judgment: SPENCE, J.




37 Cal.App.2d 255

## COWELL v. CLARK.

Civ. 11323.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1940.

**1. Licenses ⇐11(1)**

One who obtained an oil and gas lease from the state of New Mexico on lands described as two lots and nine forties each containing 40 acres or more was, in attempting to assign rights to others in units of 40 acres as the lands were described in the United States geological survey but not in smaller divisions, a "subdivider" and lands were "subdivided lands" within meaning of the Real Estate Act requiring notice of intention to sell "subdivided lands" and additional information. Gen.Laws 1937, Act 112, § 20a et seq.

"Subdivide" means to divide a tract of land into lots to sell before develop-

ing or improving them. "Subdivision" means to divide into smaller parts the same thing or subject matter.

[Ed. Note.—For other definitions of "Subdivide" and "Subdivision," see Words & Phrases.]

**2. Licenses ⇐8(1)**

The purpose of the Real Estate Act is to prevent fraud and deception. Gen.Laws 1937, Act 112, § 20a et seq.

**3. Licenses ⇐11(1)**

To accomplish the object of the Real Estate Act, the Legislature meant to place stress on trafficking in title papers after surveys were made and not on one who did the surveying. Gen.Laws 1937, Act 112, § 20a et seq.

**4. Statutes ⇐49**

The Real Estate Act is not void on ground that it requires the performance of an impossible act with reference to the subdivision of oil and gas leases, since if land is fit for oil purposes, there are well-known external characteristics which should be given for the benefit of the lessees. Gen. Laws 1937, Act 112, § 20a et seq.

**5. Constitutional law ⇐80(2)**

The Real Estate Act is not unconstitutional on ground that it purports to vest purely judicial functions in the real estate commissioner, in view of the fact that its provisions do not purport to declare that any one of the commissioner's administrative determinations may not be reviewed by the courts. Gen.Laws 1937, Act 112, § 20a et seq.; Const. art. 6, § 1.

**6. Constitutional law ⇐316**

The Real Estate Act is not unconstitutional on ground that it does not contain express words to the effect that if ascertainments made by the real estate commissioner are arbitrary, a writ of mandamus will issue to control his acts, since all laws need not be contained or reference thereto be made, in one statute, but it is sufficient that a remedy exists, whether expressed in it or other statutes. Gen.Laws 1937, Act 112, § 20a et seq.

**7. Constitutional law ⇐81**

The Real Estate Act is not invalid on ground it was not justifiable as an exercise of the police power. Gen.Laws 1937, Act 112, § 20a et seq.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by George M. Cowell, doing business as George M. Cowell Company, against J. Mortimer Clark, as real estate commissioner of the state of California. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Charles Franklin Johnson and Russell D. Garner, both of Los Angeles (Sheldon D. Elliott and Robert Kingsley, both of Los Angeles, of counsel), for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The trial court sustained the defendant's demurrer to the plaintiff's complaint. From the judgment entered the plaintiff has appealed. The complaint contained two counts. In the first count the plaintiff alleged that on the 12th day of November, 1935, the state of New Mexico was the owner of lands situated in the county of Eddy in said state, and described the lands as 2 lots and 9 forties each containing forty acres or more; that on said day it executed to the plaintiff a gas and oil lease which the plaintiff pleaded in haec verba; that plaintiff is proposing to assign rights to others in units of forty acres as said lands are described in the United States geological survey of said lands; that he does not propose nor intend to assign rights to any of said lands in smaller divisions; that all of said assignments are to be for gas and oil; that said assignments are to be on a form which he pleaded in haec verba; that defendant is the real estate commissioner of the state of California; that on July 2, 1936, the defendant as such commissioner caused to be served on plaintiff an order to show cause why the plaintiff should not be restrained from executing to others the assignments or leases above mentioned; that said order to show cause purports to be issued pursuant to the provisions of sections 20a to 20*l*, inclusive, of the California Real Estate Act, Deering's Gen.Laws, 1937, Act 112, sec. 20a et seq.; and that said sections are unconstitutional and void and in contravention of section 1, article VI, and section 1, article III, of the Constitution of California. The second count pleads the same facts and, in addition that a controversy exists between the par-

ties as to whether the intended acts of the plaintiff constitute a "subdivision" or a "subdividing" within the meaning of said sections of said statute. The record presents no question of the sufficiency of either count except the sole question as to whether plaintiff's said acts are in contravention of said statute and whether the said provisions of said statute are in contravention of the Constitution as hereinabove set forth. There was no allegation that plaintiff ever notified the defendant of his intention to make the assignments which he was about to make to other persons.

The plaintiff complains because the trial court sustained defendant's demurrer to the second count pleaded by the plaintiff. The specific facts were set forth in each count. If the plaintiff's claim that he was not "subdividing", as that word is used in the statute, is well founded, then the demurrer should not have been sustained as to either count. But, as will appear below, his said claim regarding the meaning of the statute may not be sustained. For that reason the trial court did not err in sustaining the demurrer to the second count.

[1-3] In his second point the plaintiff specially contends that he has not "subdivided", that he is not a "subdivider", and that the tracts he is attempting to lease are not "subdivisions" within the meaning of said statute. These contentions are not supported by the lexicographers nor by the clear wording of the statute. Section 20j is as follows: "§ 20j. For the purpose of this act the words 'subdivided lands' and 'subdivision' are hereby defined as land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels." Here the plaintiff was about to divide the lands, described in the lease to him, into eleven parcels and assign his lease pro tanto to each parcel. That act would be in direct violation of said section. Webster's New International Dictionary (2d Ed.) defines "subdivide": "To divide a tract of land into lots to sell before developing or improving them." Such was the act of this plaintiff. See, also, 60 C.J. 670; Gill v. Saunders, 182 Ark. 453, 31 S.W.2d 748, 749; Kansas City v. Neal, 122 Mo. 232, 26 S.W. 695, 696. As said in the case last cited: "'Subdivision' means to divide into smaller parts the same thing or subject-matter * * *." So here, the plaintiff was about to subdivide into eleven leases the subject-matter of the lease he holds. Furthermore the purpose of section 20a et seq. was to prevent fraud. To accomplish that object it is clear the legislature placed no stress on who did the surveying but it meant to place stress on trafficking in title papers after the surveys were made.

[4] In his next point the plaintiff asserts that the provisions of the Real Estate Act purporting to authorize the proceeding complained of by appellant are void as requiring the performance of an impossible act. In his argument he states no facts to support that statement. The argument distorts the statute. The plaintiff is seeking to assign a lease of lands for oil purposes. If it is fit for such purposes there are well-known external characteristics which tend to show the fact that said lands are oil bearing. If those characteristics are present the plaintiff should show the facts giving the lessees the benefit thereof. The statute merely attempts to prevent deception.

[5] The plaintiff quotes from section 20a et seq. provisions vesting in the defendant power to ascertain and make a record of certain facts and then he contends such provisions are unconstitutional in that they purport to vest purely judicial functions in the defendant—a purely ministerial officer, and that said provisions violate the provisions of section 1, article VI, of the state Constitution. In this connection it should be noted that no one of the provisions under attack purports to declare that any one of the administrative determinations of the defendant may not be reviewed by the courts. Bearing that circumstance in mind, we think the contention is not well founded. In Whitten v. California State Board of Optometry, 8 Cal.App.2d 444, 65 P.2d 1296, 115 A.L.R. 1, the same contentions were made. The facts were so nearly the same that that case must be held controlling in the present case.

[6, 7] In his last point the plaintiff claims sections 20a to 20*l* are unconstitutional for three separate reasons. He contends that the prohibitory order to be issued by the defendant is to be a binding, final, and conclusive determination on the rights of private individuals and is not subject to review by any court. The first answer in the statute is not so written. Regarding similar provisions contained in the same statute the same attack was made in Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418. But, addressing itself to said attack, at page 595, of 181 Cal., 185 P. at page 855, 8 A.L.R. 418, the court held the

powers conferred on the defendant were not arbitrary and that if the facts did not support the ascertainment as declared by the defendant his acts would be controlled by the courts in accordance with the facts. In this connection the plaintiff contends said statute is invalid because it does not contain express words to the effect that if the ascertainments made by the defendant are arbitrary a writ of mandamus will issue to control his acts. But it has never been held that all laws must be contained, or references thereto made, in one statute. It is sufficient that a remedy exists whether it is expressed in the statute expressing the power or in another statute. Matter of Application of Schuler, 167 Cal. 282, 292, 139 P. 685, Ann.Cas.1915C, 706; Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L.Ed. 1226; Upton v. Felton, D.C., 4 F.Supp. 585, 588. In the case last cited it is said: "The Nebraska law here in question is in no way lacking in due process through its failure to provide specifically for machinery to test its own validity and the validity of action taken under it. The language of the West Virginia court in Lemon v. Rumsey, State Entomologist, et al., 108 W.Va. 242, 150 S.E. 725, 726, is applicable here also. The court there said: 'The Virginia act provides for an appeal to the circuit court by the landowner from the order of the state entomologist requiring the destruction of cedar trees. The West Virginia statute has no such provision. Counsel for plaintiff contend that lack of such a provision clearly differentiates our statute from that of Virginia, and deprives a landowner of his property without a judicial hearing. Counsel overlook a fact which our Legislature undoubtedly had in mind, that courts of equity are always open to prevent an unwarranted invasion of property rights, such as might arise under this act. Witness this very proceeding. Why, then, provide a forum, when one already exists?'" Finally, it is claimed that the restrictions imposed under sections 20a to 20*l* of the Real Estate Act are not justifiable as an exercise of the police power. That claim does not present an open question. It has been decided adversely to the claim of the plaintiff. In re Sidebotham, 12 Cal.2d 434, 85 P.2d 453

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

37 Cal.App.2d 261

## PEOPLE v. GALLINGER.

Civ. 11324.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1940.

Rehearing Denied March 14, 1940.

Hearing Denied April 12, 1940.

**1. Injunction ⇐89**

In suit by the state in the name of the real estate commissioner to enjoin the defendant from violating the Real Estate Act, the gravamen of the action extended to the acts of the defendant with reference to his leasehold interest in lands located in New Mexico, and hence fact that the state of New Mexico in leasing the lands to defendant did not violate the act was immaterial. Gen.Laws 1937, Act 112, § 20a et seq.

**2. Landlord and tenant ⇐70**

A leasehold interest in realty may be spoken of as "land."

[Ed. Note.—For other definitions of "Land," see Words & Phrases.]

**3. Licenses ⇐11(1)**

Where owner of leasehold interest in lands located in New Mexico commenced to execute assignments, he was a "subdivider" within the meaning of the Real Estate Act requiring such a person to give notice of intention to sell subdivided lands and to provide additional information. Gen.Laws 1937, Act 112, § 20a et seq.

**4. Licenses ⇐8(1)**

The purpose of the Legislature in enacting the Real Estate Act was to guard against fraud. Gen.Laws 1937, Act 112, § 20a et seq.

**5. Licenses ⇐8(1)**

For the Legislature to effectively guard against fraud by the enactment of the Real Estate Act, the smaller the quantum of title of the owner, the more is the need of the act, and therefore the more is the need of construing the words used according to the context and approved usage of the language. Gen.Laws 1937, Act 112, § 20a et seq.; Civ.Code, § 13.

**6. Constitutional law ⇐70(3)**

Contention of owner of leasehold interest that compliance with the provisions of the Real Estate Act was prohibitory because of the cost of examinations required, and because the price of each assignment

that he was attempting to negotiate was a small sum of money, should have been addressed to the Legislature and not to the court. Gen.Laws 1937, Act 112, § 20a et seq.

---

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the People of the state of California in the name of J. Mortimer Clark as real estate commissioner of the state of California against Rolph Gallinger to enjoin the defendant from violating the provisions of the Real Estate Act. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Hearing denied; EDMONDS, HOUSER, and CARTER, JJ., dissenting.

Robert E. Ford, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

This is an action brought in the name of the plaintiff by J. Mortimer Clark as real estate commissioner of the state of California to obtain an injunction prohibiting the defendant from violating the provisions of section 20a et seq. of the Real Estate Act of said state. Deering's Gen. Laws, 1937, Act 112. After the trial was had an injunction issued as prayed. The defendant has appealed from the judgment. The case rests on similar facts and involves the construction of the same statute that was involved in Cowell v. Clark, Cal.App., 99 P.2d 594, this day filed. All parties entered into a stipulation that the court might make an order consolidating said actions for hearing on appeal and that the issues are substantially the same. The court made an order in accord therewith. There is one point made in the present case that was not made in the Cowell case which requires discussion.

[1-5] From section 20a the defendant quotes: "Prior to the time when subdivided lands shall be offered for sale or lease, the owner, his agent or subdivider shall notify the Real Estate Commissioner in writing of his intention to sell such offering." He then asserts that under the facts the state of New Mexico was the owner, and that the state of New Mexico has in no manner attempted to violate the statute. That contention was altogether sound before the defendant was granted a lease However, the defendant fails to give effect to all of the facts. When the state of New Mexico executed to the defendant a lease, he brought it into the state of California, and proceeded to perform the acts charged in the complaint. The gravamen of the action extends to the acts of the defendant and not to the acts of the state of New Mexico. That the defendant was the owner of a leasehold interest in the lands described in the pleadings, is not a disputed fact; and, under well-settled rules, it is approved usage of the language to speak of a leasehold interest in real estate as "land" (Estate of Pitts, 218 Cal. 184, 192, 22 P.2d 694); and when defendant commenced to execute assignments to the 40-acre tract he was a "subdivider". Cowell v. Clark, supra. Under these circumstances the statute was clearly applicable to his transactions. The statute does not use the words "owner in fee simple". As stated above, the purpose of the legislature was to guard against fraud. To do so effectively, the smaller the quantum of title of the owner the more was the need of the statute and therefore the more is the need of construing the words used according to the context and the approved usage of the language. Civ.Code, sec. 13.

[6] The defendant both attacks and attempts to distinguish In re Sidebotham, 12 Cal.2d 434, 85 P.2d 453. As to the attack it is sufficient to state that the decision is controlling in this court. Passing to the attempt to distinguish it, he asserts, "Questions are raised herein that were not raised in the Sidebotham case." He then calls attention to the fact that the cost of examinations to be made pursuant to section 20b et seq. will amount to hundreds of dollars before the defendant can obtain a permit. He also calls attention to the fact that the price of each assignment he is attempting to negotiate is a small sum of money. He argues that compliance with the provisions of the statute is prohibitory. Of course, the answer to that argument is that it should have been addressed to the legislature. The defendant's next claim is that "in the Sidebotham case a plea of guilty was entered to the charge of violating the statute and in the habeas corpus proceedings there were no facts before the court demonstrating the onerous burdens imposed by the state". The answer is that the burdens were stated on the face of the statute. The advisability of applying the provisions of the statute to

cases in general or of making exceptions as to certain transactions was a question for the legislature to determine.

We find no error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




37 Cal.App.2d 432

## In re HOLLINGSWORTH'S ESTATE. HOLLINGSWORTH et al. v. BLAINE.

Civ. 12443.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1940.

Hearing Denied April 22, 1940.

1. Wills ⇐439

A testamentary instrument is to be examined with a view of discovering the decedent's testamentary scheme or general intention.

2. Wills ⇐455

The meaning of particular words, phrases, or provisions in a testamentary instrument is to be subordinated to the scheme, plan, or dominant purpose of the decedent.

3. Wills ⇐503

Where testator gave to each person, who at time of death of testator was in his employ or in employ of one of testator's corporations and who had been in such employment continuously for period of two years immediately preceding testator's death, a sum to equal two months' wages or salary of such employee, the words "salary" and "wages" as used by testator were not intended as words of limitation as to the class of employees, but rather as a means of determining the amount of legacy to which each legatee should be entitled.

[Ed. Note.—For other definitions of "Salary" and "Wages," see Words & Phrases.]

4. Wills ⇐503

Where testator gave to each person, who at time of death of testator was in his employ or in employ of one of testator's corporations and who had been in such employment continuously for period of two years immediately preceding testator's death, a sum to equal two months' wages or salary of such employee, the words "salary" and "wages" were required to be interpreted in their broad sense since they were used in a general and not in a particular or limited sense.

5. Wills ⇐457

In the construction of a will, in order to carry out the real intention of a testator, the language used must be liberally construed and technical meaning of words used must be subordinated to general testamentary scheme.

6. Wills ⇐457

Where a will is drawn by an experienced and competent lawyer, it is to be presumed that legal terms embodied in the will were used in their legal sense.

7. Wills ⇐503

Where will, whereby testator gave to each person, who at time of death of testator was in his employ or in the employ of one of testator's corporations and had been in such employment continuously for two years immediately preceding testator's death, a sum to equal two months' salary or wages of such employee, was drawn by a skilled attorney who had been a member of the California bar for many years, presumption existed that the word "wage" was used in its legal sense.

In a limited sense the word "wage" means pay given for labor usually manual or mechanical at short stated intervals as distinguished from salary, but in general the word means that which is pledged or paid for work or other services; hire; pay. In its legal sense, the word "wages" means the price paid for labor, reward of labor, specified sum for a given time of service or a fixed sum for a specified piece of work. The word "wages" does imply that the compensation is to be determined solely upon basis of time spent in service, but it may also be determined by the work done, and "wages" means compensation estimated in either way.

8. Wills ⇐503

Testator, who gave to each person who, at the time of death of testator was in his employ or in employ of one of his corporations provided such employment was contin-

uously for period of two years immediately prior to testator's death, a sum to equal two months' "salary" or "wages" of such employee, intended that an employee who worked for one of testator's corporations solely upon a commission basis should be the recipient of a legacy.

**9. Appeal and error ⇐1050(1)**
**Stipulations ⇐14(7)**

In proceedings involving construction of will, if stipulations of parties were insufficient in themselves to establish facts from which petitioner's status as a legatee could be determined, evidence tending to prove his status as a legatee would be admissible; but, if stipulations covered every fact relevant to issue, other evidence would not properly be admissible, since its sole effect would be cumulative but in neither event could contestants be prejudiced by admission of testimony. Probate Code, § 1080.

**10. Executors and administrators ⇐314(12)**
**Wills ⇐489(2)**

Where, prior to introduction of evidence in proceeding involving question whether petitioner was entitled to legacy under bequest to each person who at time of death of testator was in his employ or in employ of one of his corporations of a sum to equal two months' salary or wages, parties stipulated that petitioner received only commissions and that he was paid no regular or fixed sum of money, action of court in permitting introduction of evidence concerning nature of petitioner's employment and amount of compensation which he received was not prejudicial error. Probate Code, § 1080.

**11. Wills ⇐503**

Where testator gave to each person who at time of death of testator was in his employ or in the employ of one of his corporations a sum to equal two months' salary or wages of such employee based on salary or wage which employee was drawing or receiving at time of testator's death, an award of $155 to an employee who was working on a commission basis and who earned $77.50 during each of the two months immediately preceding the testator's death was not erroneous.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceedings in the matter of the estate of William Irving Hollingsworth, deceased, wherein Miles W. Blaine filed a petition to have his interest in the deceased's estate determined and William Irving Hollingsworth, Jr., and another, executors of the estate of William Irving Hollingsworth, deceased, and others, filed answers in opposition. From a judgment for the petitioner determining that the petitioner was interested in the estate as a legatee, the contestants appeal.

Affirmed.

Binford & Binford, of Los Angeles, for appellants.

Stanley M. Arndt, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment of the superior court, sitting in probate, determining that respondent is interested in the estate as a legatee and that he is entitled under decedent's will to have distributed to him the sum of $705.

The decedent, William I. Hollingsworth, died testate in September, 1937. In due course his will was admitted to probate and thereafter respondent petitioned the court under section 1080 of the Probate Code to have his interest in the estate determined. Respondent, who was employed by W. I. Hollingsworth & Co. as a real estate salesman, claimed an interest in said estate by virtue of paragraph Fourth (a) of the will, which provides: "I hereby give, devise and bequeath to each person (including domestic servants), who at the time of my death is in my employ and/or in the employ of W. I. Hollingsworth & Co., and/or in the employ of the Hollingsworth Corporation, provided such person has been in my employment or in the employment of either of said corporations continuously for a period of two (2) years immediately prior to my demise, a sum to equal two months salary or wages of such employee, based on the salary or wage which such employee was drawing or receiving at the time of my death, and in addition thereto, the sum of Fifty ($50.00) Dollars for each additional year beyond said two years period of such continuous service." Statements or answers in opposition to respondent's petition were filed by the executors and residuary legatees. From the evidence adduced at the hearing the court found that respondent was an employee of W. I. Hollingsworth & Co., although he received no fixed, periodic salary or wage, being paid solely upon a commission basis;

that he had been employed by said company as a real estate salesman continuously for a period of thirteen years prior to decedent's death; that during the two months immediately preceding the death of decedent, respondent received as commissions $77.50 per month. The court entered its decree holding respondent to be entitled upon distribution to $705 as a legatee under the will. Said award is made up of the sum of $155, which represents two months' salary, and $550, which represents the further bequest of $50 per year for the additional eleven years that respondent had been employed by the company.

Both the executors and the residuary legatees have appealed from the decree in favor of respondent, claiming that the court erred in several particulars. However, the controlling question on this appeal has to do with the interpretation of the portion of the will in question, i. e., was it the intention of the testator that respondent and others who worked for testator or one of his corporations, solely upon a commission basis, should be the recipients of the legacies provided in the will?

[1, 2] Appellants make no contention that respondent was not an employee of W. I. Hollingsworth & Co. On the contrary, it is conceded that he was so employed and there is ample evidence to support the finding of the court to that effect. It is contended, however, that when the testator used the words "salary" and "wages" it was his intention to limit the bequests so as to exclude employees who were paid solely on a commission basis. A rule to be followed in the interpretation of the provisions of a will is that the testamentary instrument is to be examined with a view of discovering the decedent's testamentary scheme or general intention. The meaning of the particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose. Estate of Puett, 1 Cal. 2d 131, 33 P.2d 825. The general testamentary scheme disclosed by the paragraph of the will in question is to award the faithful employees who have given their exclusive time and efforts in furthering the testator's business interests. There were two general classes of employees in W. I. Hollingsworth & Co., one group being paid a fixed, periodic sum of money and the other, comprising the real estate salesmen, being paid on a commission basis. This being so, in the light of the general testamentary scheme it is difficult to understand why the testator would seek to reward one class of employees and exclude another. More specifically, the obvious intention of the testator, as gathered from the language used in the will, was to reward each person in his employ, or in the employ of either of his corporations, provided such employee had been employed continuously for at least two years prior to testator's death. The requirement of two years' continuous employment is the sole limitation upon the class of beneficiaries who are to take under the will.

[3-8] The words "salary" and "wage" as used by the testator were not intended as words of limitation as to the class of legatees, but rather as a means of determining the amount of the legacy to which each legatee should be entitled. It follows, therefore, that since such words were used in a general, and not a particular or limited sense, they should be interpreted in their broader sense. This is particularly true in view of the elementary rule in the construction of wills that in order to carry out the real intention of the testator, the language used must be liberally construed and the technical meaning of words used must be subordinated to the general testamentary scheme. Estate of Hoytema, 180 Cal. 430, 181 P. 645; Estate of Thompson, 18 Cal.App.2d 680, 64 P.2d 984. In a limited sense, the word "wage" has been defined as "pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries". (Webster's New International Dictionary, 1931 edition.) The same authority, however, defines the word in general to be "That which is pledged or paid for work or other services; hire; pay." In its legal sense, the word "wages" has been variously defined as "the price paid for labor; reward of labor; specified sum for a given time of service, or a fixed sum for a specified piece of work". 67 Cor.Jur., p. 284. The broad meaning of the word is correctly stated in the case of Adcock v. Smith, 97 Tenn. 373, 37 S.W. 91, at page 92, 56 Am.St.Rep. 810 where it is said: "The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service, but it may also be determined by the work done. 'Wages' means compensation estimated in either way." Section 200(a) of the California Labor Code St.1937, p. 197, pro-

vides: "'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." It is thus apparent that in its legal sense, the word has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed. Where a will is drawn by an experienced and competent lawyer, it is to be presumed that legal terms embodied in the will are used in their legal senses. Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193. In the instant case, the will was prepared by a skilled attorney who had been a member of the California bar for many years. It must therefore be presumed that when the word "wage" was used, it was used in its legal sense. We conclude that the testator intended that employees, such as respondent, who were employed upon a commission basis, should take under the questioned provision of the will. Had it been the intention of the testator to exclude from his bounty employees who were paid on a commission basis, it would have been a simple matter to have indicated that intention by the use of appropriate language.

[9, 10] At the trial, prior to the introduction of any evidence, the parties entered into a stipulation to the effect that respondent received only commissions from the sale of real property and that he was paid no regular or fixed sum of money for his services as a salesman for W. I. Hollingsworth & Co., in which capacity he had been engaged on the date of testator's death and for more than two years prior thereto. Thereafter, over appellants' objection, the court permitted the introduction of evidence concerning the nature of respondent's employment and the amount of compensation which he received. It is now contended that the court erred in receiving such evidence. Appellants' theory appears to be that since it was admitted by stipulation that respondent was a "commission" employee, evidence tending to show that respondent was a "salary" or "wage" employee was inadmissible under any circumstances. As we have heretofore pointed out, however, the fact that respondent received commissions only for his services was not determinative of his status as a legatee under the will. Since the will provided a legacy of two months' salary or wage to each person "in my employ", without naming such persons, any person claiming under such provision would necessarily have to establish by evidence, aliunde the will, that he was a person in testator's employ or in the employ of one of the named corporations. It would likewise be incumbent upon such person to prove the amount of salary or wage which he was receiving at the time of testator's death. Unquestionably such facts could be established by stipulation of the parties. We deem it unnecessary to decide whether the stipulations of the parties in the instant case were sufficient in themselves to establish the facts from which respondent's status as a legatee could be determined. It is sufficient to note that if such stipulations were insufficient in any respect, evidence tending to prove respondent's status as a legatee would be admissible. If, on the other hand, such stipulations covered every material fact relative to such issue, other evidence would not properly be admissible since its sole effect would be cumulative. In neither event could appellants be prejudiced by the admission of such testimony.

[11] Although appellants assert that the manner in which the court computed the two months' salary or wage which respondent was receiving at the time of testator's death was erroneous, they have failed to point out wherein the error lies, and we have been unable to find anything unjust or prejudicial in the court's computations. The award of $155 was based upon a finding that respondent earned $77.50 during each of the two months immediately preceding the death of testator. No assertion is made as to what period of time should have been used in making the computations, the sole claim being that the period used was erroneous. The portion of the will under which this computation was made reads as follows: "* * * a sum to equal two months' salary or wages of such employee, based on the salary or wage which such employee was drawing or receiving at the time of my death * * *". It is reasonable to assume that the testator intended that the amount of the legacy should be equal to the amount of the salary or wage which the legatee received during the two months immediately preceding testator's death. Conceivably, it might have been his intention that the legacy be determined by multiplying by two the amount

of salary or wage received during the month in which testator died. Under neither theory could appellants have suffered any prejudice, since respondent's earnings in each month were equal.

The remaining contentions of appellants are without merit.

Judgment affirmed.




38 Cal.App.2d Supp. 768

## PEOPLE v. KIRBY.

C. A. 1647.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 20, 1940.

**1. Automobiles ⇐326**

Automobile owner who obtained 1939 registration certificate but refused to accept license plates bearing words "California World's Fair '39," and continued to display 1938 plates upon refusal of Division of Motor Vehicles to issue plates without advertising matter, did not violate Vehicle Code provision requiring display of current year's license plates when and as required by the Code, since the Code did not authorize plates with such advertising matter. Vehicle Code, § 237, St.1935, p. 127; § 156(b), St.1935, p. 112; §§ 160, 161, St.1935, p. 113; § 164, St. 1935, p. 114.

**2. Automobiles ⇐41**

The Vehicle Code provision that every license plate shall have upon it a registration number, the word "California" or abbreviation, and the year, is inclusive and exclusive and applies to every license plate, hence Division of Motor Vehicles could not require automobile owner to display, with or without compensation, unauthorized plates bearing words "California World's Fair '39." Vehicle Code, § 156(b), St.1935, p. 112; §§ 160, 161, St.1935, p. 113; § 164, St.1935, p. 114; § 237, St.1935, p. 127.

Appeal from Municipal Court of Los Angeles; Byron J. Walter, Judge.

Patrick F. Kirby was convicted for failure to display proper license plates upon his automobile, in violation of Vehicle Code, § 237, St. 1935, p. 127, and he appeals.

Reversed and remanded, with directions.

Joe H. Kirby and John A. Holland, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Frank H. Ferguson, Deputy City Atty., all of Los Angeles, for respondent.

SCHAUER, Judge.

Defendant appeals from a judgment of conviction of violation of section 237, Vehicle Code (St.1935, p. 93). All of the evidence upon which the conviction is based was presented by stipulation. From such stipulated facts, it appears that at the time of defendant's arrest, May 6, 1939, he was operating his automobile on a public highway in the city of Los Angeles and that at that time there was displayed in the automobile, as required by the Vehicle Code, a certificate of registration for the year 1939, bearing the number 8A–57–49 and that attached to the automobile were license plates, issued for it in 1938, and bearing the number 1T–61–39. Because defendant did not display 1939 license plates bearing the number conforming to the 1939 registration, he was arrested, charged, convicted, and sentenced.

It further appears that defendant's application for 1939 registration and license plates was seasonably made (January 23, 1939), that he then paid the full amount of the registration fee and vehicle tax and that the Division of Motor Vehicles of the state in a few days forwarded to defendant the certificate of registration which was properly displayed in his car at the time of his arrest and certain proposed license plates bearing the identifying number shown on the certificate and also bearing the words "California World's Fair '39." Immediately upon receipt of such plates defendant returned them to the Division of Motor Vehicles, stating that they were not acceptable to him, that they did not bear the inscription required by section 156 of the Vehicle Code, that he did not wish to display advertising on his automobile without compensation, and demanding that plates be issued to him without the advertising matter thereon. The Division of Motor Vehicles declined to issue or provide defend-

ant with any plates other than those originally tendered.

[1] The foregoing stipulated facts not only fail to support defendant's conviction, but require that he be adjudged not guilty.

Section 237 of the Vehicle Code makes it unlawful to operate a motor vehicle on a highway only "unless there shall be attached thereto and displayed thereon when and as required by this code a valid registration card and license plate or plates issued therefor by the department for the current registration year." Section 160 of the same code requires that application for renewal of annual registration of a vehicle shall be made, and the fee therefor paid, between January 1 and February 4, succeeding expiration of the preceding registration, and section 161 provides that: "When application for renewal of registration * * * has been made as required in section 160 hereof, such vehicle may be operated on the highways until the new license plate or plates have been received from the department upon condition that there be displayed on such vehicle the license plate or plates issued to such vehicle for the previous year." Section 164 provides that upon renewing a registration the department "shall issue a new registration card and license plate or plates to the owner as upon an original registration."

[2] It will be remembered that section 237, above quoted from, and which defendant has been found guilty of violating, in so far as it is pertinent here, predicates the offense only on failure to display license plates "when and as required by this code." The license plates so required by the code are described in section 156(b) as follows: "Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, together with the word 'California' or the abbreviation 'Cal.' and the year number for which it is issued." There is nothing in the slightest degree uncertain or ambiguous in the foregoing language prescribing what shall be shown on the license plates. That language is obviously both inclusive and exclusive and it applies to every license plate. The Department of Motor Vehicles had no more authority or right to require defendant to display, with or without compensation, a license plate advertising the California World's Fair than it had to compel him to carry a banner or make oral speeches advertising the Fair, the climate, prunes, oranges or a political party. It was clearly the duty of the department to furnish defendant with license plates "as required by this code" and he could not be compelled to display unauthorized plates. To hold otherwise would be to authorize the taking of his property without due process of law and would countenance an unwarranted invasion of his personal liberty.

While awaiting the receipt of proper plates defendant, exactly as required by the statute, displayed the plates issued to his vehicle for the preceding year. Thus, instead of proving a violation of the law, the stipulated facts, as above stated, show that defendant fully complied with it.

The judgment is reversed and the cause is remanded to the Municipal Court, with directions to enter a judgment of not guilty.

SHAW, P. J., and BISHOP, J., concur.

15 Cal.2d 191

## BARNETT et al. v. LA MESA POST NO. 282, AMERICAN LEGION DEPARTMENT OF CALIFORNIA, et al.

L. A. 17277.

Supreme Court of California.

Feb. 29, 1940.

**1. Animals ⇐74(5)**

In action for injuries sustained by plaintiffs when they were struck by horse during formation of parade, evidence was insufficient to show that horse was vicious animal or that defendants knew that horse had any bad habits which would make him dangerous to people nearby.

**2. Animals ⇐74(5)**

Where evidence did not show that horse which struck plaintiffs during formation of parade was known to be vicious at any time prior to the parade, defendants could not be held liable for horse's acts on the ground that horse should not have been allowed in parade because of habits which made it dangerous, notwithstanding testimony concerning vicious acts of the horse immediately preceding the injuries to plaintiffs.

**3. Animals ⇐67**

Sponsor of parade and owner and rider of horse which struck plaintiffs, who were watching formation of parade, were liable to plaintiffs for any failure to exercise ordinary care at time of accident, regardless of whether plaintiffs were invitees or licensees, in view of fact that even if plaintiffs were mere licensees, sponsor and owner and rider either knew of plaintiffs' presence, or were chargeable with knowledge under circumstances of the case.

**4. Trial ⇐139(1)**

Motion for nonsuit may not be granted except where there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given.

**5. Trial ⇐165**

In considering motion for nonsuit, evidence must be viewed most favorably to plaintiff, with every legitimate inference drawn in his favor and conflicts disregarded.

**6. Animals ⇐74(8)**

Negligence of sponsor of parade and of owner and rider of horse which struck plaintiffs during formation of parade which plaintiffs were viewing and contributory negligence of plaintiffs were questions for jury.

---

In Bank.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Marion R. Barnett and others against the La Mesa Post No. 282, American Legion, Department of California, and others, for injuries sustained when the plaintiffs were struck by a horse during a parade. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Prior opinion, 92 P.2d 461.

Fenton Garfield, August J. O'Connor, and G. J. Hider, all of Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, and W. H. Jennings, of La Mesa, for respondents.

EDMONDS, Justice.

Marion R. Barnett and her young daughter sued to recover damages for personal injuries claimed to have been sustained by them when a pet show was given by the local post of the American Legion at La Mesa. The accident which occasioned the litigation is said to have occurred when they were struck by a horse owned by Fred Slocum and being ridden by Herbert Slocum, who are also named as defendants in the action. At the close of the plaintiffs' case the court granted a motion for a nonsuit and thereafter entered a judgment of dismissal.

The facts are practically undisputed. The American Legion Post sponsored a parade as part of the festivities to celebrate the burning of certain bonds which had been issued for local improvements. This parade was formed on the school grounds and included the palomino horse which caused the accident. The mother and daughter were not to participate in the parade but had come on the school grounds with Mrs. Barnett's sister to deliver some caps to the sister's children. Thereafter they remained upon the school grounds viewing the formation of the parade.

The complaint contains two counts. In the first count, respondents are charged with negligence. The second count asserts a cause of action upon the ground that the horse which caused the injuries

was a vicious and dangerous animal. The respondents deny these allegations and charge the injured persons with contributory negligence.

The testimony offered on behalf of the appellants shows that at the time of the accident Mrs. Barnett and her daughter were standing some seventy to ninety feet away from where the horses were grouped and were looking in the opposite direction. The palomino horse became uncontrollable, and while "rearing and whirling and backing around", struck them. Mrs. Barnett was rendered unconscious by the impact and her daughter received minor abrasions.

The appellants contend that the evidence which they presented shows that the horse was a vicious and dangerous animal, which characteristics were well known to the respondents, and that the respondents acted negligently in forming the parade. On the other hand, the respondents claim, in support of the nonsuit, that there is not sufficient evidence to support a finding that the horse was or was known to be either dangerous or vicious.

[1, 2] Unquestionably the evidence is not sufficient to show either that the horse was a vicious animal or that the respondents knew that he had any bad habits which would make him dangerous to people nearby. All of the testimony upon this point concerned the acts of the horse upon the school grounds. One witness, a boy of fifteen years of age and a participant in the parade, testified: "The horse cut up a couple of times before Mrs. Barnett was hurt. One time he came up in just a little bit of hitting me." The young son of the chairman in charge of the parade asserted that for half an hour before the accident the horse kept bolting, circling around, crowhopping, rearing and plunging. Another witness said: "Well, that horse * * * seemed to be kind of skittish and didn't seem like it was ever around a crowd like that before, and it was jumping around and it wouldn't stand still and just moving all the time sidestepping and kind of jumping and cutting up all the time." Several other witnesses testified to the same effect. However, there is no evidence whatever to show that the horse was known to be vicious at any time prior to the parade, and therefore the respondents cannot be held liable for its acts as an animal which should not have been allowed in the parade because of habits which make it dangerous. Haneman v. Western Meat Co., 8 Cal.App. 698, 97 P. 695; Finney v. Curtis, 78 Cal. 498, 21 P. 120; Looney v. Bingham Dairy, 70 Utah 398, 260 P. 855.

[3] But it does not follow that the nonsuit was properly granted upon the second cause of action which is based upon the asserted negligence of the respondents in the supervision and management of the animals exhibited. If the injured persons were invitees the respondents owed them the duty of ordinary care. If they were licensees, the respondents either knew of their presence on the school grounds, or are chargeable with this knowledge under the circumstances shown in the evidence, and are liable for any failure to exercise that same degree of care. Hamakawa v. Crescent Wharf etc. Co., 4 Cal.2d 499, 50 P.2d 803; Lindholm v. Northwestern Pac. R. Co., 79 Cal.App. 34, 248 P. 1033; Lucas v. Walker, 22 Cal.App. 296, 134 P. 374, 379.

[4, 5] The respondents insist that because the actions of the horse which caused the injury were as apparent to bystanders as to the respondents, the appellants may not recover for any injuries sustained by them. This argument is one which might very properly be strongly urged before the trier of fact or in support of a judgment in their favor. However, a motion for a nonsuit may not be granted except where there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such verdict were given. In considering such a motion the evidence must be viewed most favorably to the plaintiff, with every legitimate inference drawn in his favor and conflicts disregarded. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 64 P.2d 946; Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66.

[6] Measured by this rule, the evidence offered by the appellants tends to prove their charge of negligence and would support a verdict and judgment in their favor. They were therefore entitled to determination by the jury of the issues of fact presented.

The judgment is reversed.

We concur: WASTE, C. J.; CARTER, J.; GIBSON, J.; CURTIS, J.

## SUTPHIN v. SPEIK.

L. A. 17142.

Supreme Court of California.

Feb. 29, 1940.

Rehearing Denied March 30, 1940.

Subsequent Opinion 101 P.2d 497.

**1. Judgment ⇐719**

Where assignment of participating royalty interest in oil lease covered original well or any substitute therefor, original well was destroyed by fire, new well was drilled in its place using part of original hole, and an additional well was drilled some 50 feet from new well, in action to recover royalties due under the assignment, it was within issues for court to determine whether the new and additional wells were substitutes for the original and destroyed well, as regards applicability of "res judicata doctrine."

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata Doctrine".

**2. Judgment ⇐724**

The findings constitute the "decision of the court" as regards contention that in determining question of "res judicata," judgment alone should be considered and the findings disregarded if outside the scope of the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision of the Court."

**3. Judgment ⇐585(1)**

Where the causes of action of the parties are the same, a prior judgment is a complete bar in a second action.

**4. Judgment ⇐720**

Where causes of action are different but the parties are the same, the "res judicata doctrine" applies so as to render conclusive matters which were decided by the first judgment.

**5. Judgment ⇐720**

A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication regarding such issues in the second action as were actually litigated and determined in the first action.

**6. Judgment ⇐713(2)**

A prior judgment is "res judicata" on all matters which were raised or could have been raised on matters litigated or litigable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata."

**7. Action ⇐53(1)**

A party cannot by negligence or design withhold issues and litigate them in consecutive actions.

**8. Judgment ⇐713(2)**

Where assignment of participating royalty interest in oil lease covered original well or any substitute therefor, original well was destroyed by fire, new well was drilled in its place, using part of original hole and an additional well was drilled some 50 feet from new well, and court had determined in prior action to recover royalties that assignee was owner of royalty on total production of the two wells, and where, in subsequent action to recover royalties, defendant raised defense that wells bottomed on state land, and that after judgment in prior action defendant acquired independent title to oil from state, "res judicata doctrine" was applicable, since defense could have been raised in first action.

**9. Mines and minerals ⇐79(1)**

Agreement between state and defendant whereby defendant acquired right to produce oil from state land under ocean could not give defendant any right to enter and drill upon private land, as regards right of assignee of participating royalty interest in oil lease covering land on which wells were drilled to royalties.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by I. O. Sutphin against Frederick A. Speik for royalties due under an assignment of a participating royalty interest in an oil and gas lease. From a judgment for plaintiff, defendant appeals.

Affirmed.

Rehearing denied; SHENK and HOUSER, JJ., not participating.

Prior opinion, 87 P.2d 87.

John W. Preston, Wood, Crump & Rogers, Crump & Rogers, and John Perry Wood, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

GIBSON, Justice.

This is an action to recover royalties due under an assignment of a participating royalty interest in an oil and gas lease. As will

presently appear, a judgment entered in a prior action between the same parties has determined the issues involved in this case.

In 1926 the California Petroleum Corporation leased property consisting of two small lots in Huntington Beach, California (designated as lots 12 and 14), to C. K. Cole as lessee, reserving a royalty of 17½ per cent. Cole assigned the lease to his wife, who on January 7, 1927, assigned to plaintiff Sutphin a royalty interest described as: "A participating royalty interest of Five per cent (5%) of the gross total production of all oil, gas and other hydrocarbons produced, saved and sold from said well on said premises, or any substitute well therefor * * *." Subsequently, in June, 1928, the Coles assigned the entire lessee's interest to defendant Speik, excepting therefrom landowner's royalty, and royalties theretofore sold.

At the time the assignment to plaintiff was made, a well, designated as number 3, was being drilled, which later went into production. In October, 1932, well number 3 and its equipment were destroyed by fire, and defendant drilled another well in its place, using part of the original hole and casing. This well was numbered 3A and went into production in August, 1933. In October, 1933, well number 4, located some fifty feet from number 3A, was completed, and both wells are now producing.

Plaintiff Sutphin brought his first action against the defendant Speik on October 27, 1933, to recover royalties then due under his 5 per cent participating royalty interest. Judgment was rendered in plaintiff's favor on April 5, 1934, in the sum of $6,388.82 and interest. Appended as an exhibit to the complaint in the present suit are the findings and judgment of the court in the original action. The material findings are as follows:

That plaintiff by written assignment for valuable consideration acquired a 5 per cent interest in the total production of oil and gas from lots 12 and 14 under the oil lease between the California Petroleum Corporation and Cole.

That at the time defendant received his assignment of the lease he had knowledge of the 5 per cent interest previously assigned to plaintiff.

That the last well (number 4) "produces from the same zone and pool as said redrilled well number 3".

That "The plaintiff is now and ever since the 7th day of January, 1927, has been the owner of said five per cent of the total production of oil, gas and other hydrocarbons produced, saved or sold from said premises, and of the moneys derived from the sale of said five per cent of said total production."

In its conclusion of law the court declared, among other things, that "plaintiff is entitled to judgment declaring him the owner of five per cent of the total production of oil, gas and other hydrocarbons produced, saved or sold from lots 12 and 14 * * * whether or not same is produced from one or more wells upon said premises".

The court adjudged plaintiff to be the owner of 5 per cent of the total production of oil and gas from said lots 12 and 14, "whether same is produced from one or more wells upon said premises, and as such owner plaintiff is entitled to receive all moneys derived from the sale of said five per cent of the total production * * * from said lots 12 and 14".

Defendant Speik appealed. The judgment was affirmed by the District Court of Appeal, Second Appellate District, Division One, and a hearing was denied by this court. Sutphin v. Speik, 15 Cal.App.2d 516, 59 P.2d 611. The judgment became final and was satisfied as to the royalties then adjudged to be due. In affirming the judgment, the opinion of the District Court of Appeal, after summarizing the facts, stated that it was the defendant Speik's contention that the evidence was insufficient to support the finding of indebtedness, the finding that plaintiff was the owner of a 5 per cent interest in the total production from the property, and the finding that well number 4 produced from the same zone and pool as well number 3. The court rejected this contention, and upheld the judgment.

The present action was filed October 29, 1936, to recover royalties accruing after the entry of the judgment, and was grounded on the rights adjudicated by that judgment. Defendant pleaded as his chief defense that well number 4 does not produce from any sand or oil deposit underlying the property but was drilled as a "whipstock well" diagonally into oil producing sand under the Pacific Ocean, more than two thousand feet from the property, and that well number 4 therefore produces from sands and oil deposits which do not extend beneath these lots.

At the trial defendant made an offer to prove that a royalty was being paid to the state of California from the production of

wells number 3A and 4 by virtue of an agreement permitting production from state land under the ocean. The court excluded the offered evidence.

Counsel for plaintiff offered in evidence, among other things, Speik's opening brief and petition for hearing in the first case, and these were admitted for the limited purpose of showing similarity of contentions raised in the two actions.

It was stipulated by defendant that it was the contention of defendant in the former trial that plaintiff Sutphin had no interest in either well number 3A or 4.

The trial court in the present action made findings which reviewed the prior proceeding, and then found as follows:

That plaintiff has not received his 5 per cent royalty on oil and gas produced from wells 3A and 4 since entry of the former judgment.

That no wells other than 3A and 4 have been drilled and that "the location of said wells both above and below the surface of the ground is the same at this time as at the time the trial was had in said action and both are producing from the same sand as at the time of said former trial".

That wells 3A and 4 produce from the same zone and pool.

That it is immaterial whether they are "whipstock wells" because of the doctrine of res judicata and that all of the defenses here urged existed at the time of the former trial.

Judgment accordingly went for the plaintiff in the sum of $31,932.54 together with interest. Defendant Speik brought this appeal.

Three weeks prior to the commencement of the present action Speik instituted a quiet title suit against Sutphin seeking a determination of rights and also a declaratory judgment in respect to the lease and assignment. That action raises substantially the same issues as those presented in the present action by Sutphin against Speik for royalties. The two cases were consolidated for trial and both are before this court at the present time. We are today deciding the quiet title suit by a memorandum opinion. Speik v. Sutphin, Cal.Sup., 99 P.2d 656.

This brings us to a consideration of the issues on this appeal. The lower court decided the case on the theory that the prior judgment was res judicata. If this conclusion is correct, the judgment must be affirmed on that ground alone and it is neither necessary nor proper to reexamine on their merits the various defenses urged by appellant. The prior judgment, as will be seen from an examination of its provisions and of the foregoing excerpts from the findings and conclusions, determined that plaintiff was the owner of 5 per cent of the total production of the two wells. This determination in the prior judgment necessarily establishes plaintiff's right in this action to recover royalties based on subsequent production of wells 3A and 4, unless defendant's attack on the applicability of the doctrine of res judicata is successful.

The contentions of defendant in this connection are as follows: (a) The causes of action in the two suits are different, and the judgment in the first is not res judicata in the second. (b) The issue of ownership of oil or rights therein produced from state lands by a "whipstock well" was not raised or decided in the first action, and is not res judicata. (c) Defendant Speik, after the judgment in the first action, acquired an independent title to the oil from the state lands which he could not have set up in the first action. The defendant argues that the estoppel of a judgment extends only to facts and conditions as they were at the time the judgment was rendered. (d) The language in the prior judgment and in the District Court of Appeal opinion, which would purport to establish a right in such oil, went beyond the issues raised and is surplusage and void. In this connection it is argued that the District Court of Appeal merely affirmed and did not modify the judgment; hence, its opinion cannot enlarge the scope of the judgment.

All of these contentions merely represent different methods of expressing the single defense that the assignment to plaintiff and the prior judgment in his favor were only intended to give to plaintiff a right in oil produced from a particular well or any "substitute therefor" drawing oil from strata directly underlying the leased premises; and that neither was intended, nor could be construed to establish in plaintiff any right to oil drawn through that well or any other well where the oil itself came from strata not underlying these lots.

[1, 2] The argument of defendant is, in substance, an attack upon the findings and judgment in the prior action, the undoubted purpose of which is to avoid the broad de-

termination of the issues therein made. The assignment upon which plaintiff relies covered the original well number 3 (subsequently destroyed by fire) or any "substitute therefor". It was entirely within the issues of the first action for the court to determine whether wells number 3A or 4 or any other wells then on the premises were substitutes for the original and destroyed well number 3. It is clear from an examination of the findings and judgment therein that plaintiff was adjudged in the prior action to be entitled to his percentage of the production of any wells then drilled on the particular premises regardless of where the wells were bottomed, or the source of the oil delivered by them. The suggestion made by defendant that the "judgment alone should be considered and the findings disregarded if outside the scope of the judgment" can have no force in view of the settled rule that the findings constitute the decision of the court. The further contention is made that the opinion of the District Court of Appeal upon the prior appeal cannot be looked to for a determination of the rights of the parties herein, because that court merely affirmed and did not modify the judgment. We need not consider this contention for that opinion is not necessary to plaintiff's case. The findings and judgment of the lower court in the prior action are sufficiently broad for plaintiff's present purposes.

As already indicated, defendant's contention that the doctrine of res judicata is not applicable here is grounded upon the proposition that the causes of action involved in the prior and present suit are different, and that the defenses that title had been acquired from the state, and that the oil was being taken from lands outside the boundaries of the lots, were not raised in the prior action. A complete answer to this contention may be found in an examination of the scope of the doctrine of res judicata, which has been fully considered by this court in recent cases.

[3] First, where the causes of action and the parties are the same, a prior judgment is a complete bar in the second action. This is fundamental and is everywhere conceded.

[4, 5] Second, where the causes of action are different but the parties are the same, the doctrine applies so as to render conclusive matters which were decided by the first judgment. As this court said in Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916, 918: "A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." In the instant case, for example, the severable installments of royalties due gave rise to separate causes of action; but a determination of a particular issue in the prior action is res judicata in the second action. See, also, Pratt v. Vaughan, 2 Cal.App.2d 722, 38 P.2d 799.

[6, 7] Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment. Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. In Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387, 390, this court said: "But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. * * * This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them." See, also, Elm v. Sacramento Suburban Fruit Lands Company, 217 Cal. 223, 17 P.2d 1003; Andrews v. Reidy, 7 Cal.2d 366, 370, 60 P.2d 832; Minnich v. Minnich, 127 Cal.App. 1, 15 P. 2d 804.

Defendant relies on English v. English, 9 Cal.2d 358, 70 P.2d 625. In that action, plaintiff sued to rescind a separation agreement in which he had promised to pay his wife $200 per month until a total of $10,000 had been paid. He alleged that the agree-

ment was obtained by fraud and duress. The wife contended that the validity of the agreement had been established by a default judgment in her favor in a suit to recover installments due under the contract, and that the issue was therefore res judicata. The court held that although a default judgment is conclusive as to facts necessary to uphold that particular judgment, it is not conclusive in a subsequent suit on a different cause of action against any defenses which defendant has, because the issues raised by these defenses were not tried and cannot be deemed adjudicated. This case states an exception to the normal rule of res judicata, limited to default judgments, and has no bearing on the situation before us.

[8] It remains only to see whether the defense now raised by defendant, that the wells bottomed on state land, could have been raised in the first action. If so, the defense of res judicata applies. The answer seems entirely clear. At the time of the first action, wells number 3A and 4 were drilled and producing. Defendant knew or should have known of the source of the oil therefrom. If the asserted defense has merit, it was as good and available then as now. This being so, it can make no difference whether it was actually pleaded, or whether evidence was introduced thereon or not. We are not impressed by defendant's assertion that he could not have raised the defense in the first action because it would amount to an admission of trespassing on state land. The defense might have been weak, embarrassing, or dangerous to the defendant; and he may have chosen to refrain from presenting it for reasons important to himself; but this can have no present effect upon the conclusiveness of the determination in the plaintiff's favor. When we say that the issue could have been raised, we mean that it was relevant to or within the scope of the action, and not that it was at the time a defense upon which the defendant might prevail.

[9] A similar contention of defendant is that he could not set up his right derived from the state because he had not yet obtained it at the time of the first action. This argument might be persuasive if the issue presented here was as to the right to take oil from state land. But that is not the issue here. The issue is whether plaintiff under his assignment was entitled to 5 per cent of the production of certain wells drilled on certain lots, which production defendant was actually taking and marketing. Whether defendant originally had an absolute or qualified right to such production, whether defendant had to pay the state for that right, or whether, indeed, the wells actually did draw oil from state land (a disputed point), are clearly immaterial matters. Obviously, if the state asserted a paramount right and stopped production, plaintiff would be entitled to nothing, since nothing would be produced. But here defendant did continuously take and sell the oil from the wells in question, and whenever he did, his activities came within the scope of the former judgment. It need hardly be added that his agreement with the state could not give him any right to enter and drill upon the private land here involved. The agreement clearly has no relation to the rights of the plaintiff under the assignment.

It follows therefore from a consideration of the former judgment, in the light of these rules, that plaintiff is entitled to his present judgment without any further consideration of the merits. Accordingly, we have made no attempt to discuss the conflicting evidence on such matters as the purpose of the assignment, the source of the oil, or other points previously determined.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CARTER, J.; CURTIS, J.; WOOD, Justice pro tem.; McCOMB, Justice pro tem.




15 Cal.2d 764

**SPEIK v. SUTPHIN.**

**L. A. 16530.**

Supreme Court of California.

Feb. 29, 1940.

**Rehearing Denied March 30, 1940.**

**Action ⇐6**

**In action to quiet title and to obtain declaratory relief regarding rights arising under an oil lease, judgment for defendant was affirmed.**

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Frederick A. Speik against I. O. Sutphin to quiet title and to obtain declaratory judgment regarding rights arising under oil lease. From an adverse judgment, plaintiff appeals.

Affirmed.

Rehearing denied; SHENK and HOUSER, JJ., not participating.

John W. Preston and Crump & Rogers, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondent.

GIBSON, Justice.

This is an action to quiet title and to obtain declaratory relief in respect to rights arising under an oil lease. The action raises the same issues as those presented in the companion case of Sutphin v. Speik, 99 P.2d 652, this day decided. On the authority of that case the judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CARTER, J.; CURTIS, J.; WOOD, Justice pro tem.; McCOMB, Justice pro tem.




37 Cal.App.2d 498

**PEOPLE v. HIGHT.**

Cr. 3293.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1940.

**1. Burglary ⇐41(1)**

Evidence was sufficient to sustain convictions for first-degree burglary of two apartments.

**2. Criminal law ⇐1037(1)**

Objection cannot be made on appeal to the alleged misconduct of the district attorney unless objection was first made at the trial and an opportunity afforded to the trial judge to correct the error, if any.

**3. Criminal law ⇐1037(1)**

For the purposes of review, no objection need be noted at the trial to alleged misconduct of the district attorney, where the alleged misconduct is of such a character that prejudice is bound to follow and prejudice would in all probability be unaffected by instructions and admonitions of the trial judge.

**4. Criminal law ⇐1037(1)**

An appellate tribunal will assiduously inquire into the whole record for purpose of determining whether alleged misconduct of district attorney, asserted for the first time on appeal, resulted in prejudicial error only where defendant's guilt is doubtful.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry J. Hight was convicted in two consolidated cases of burglary of the first degree, and he appeals.

Affirmed.

George Stahlman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

DORAN, Justice.

In two informations which were consolidated for trial the defendant was accused of burglary. The jury returned a verdict of guilty of burglary of the first degree in each case, and in each case found the prior conviction of a felony to be true. Motions for a new trial were denied, and the appeal is from the judgment and from the order denying the motion for a new trial, in each case.

It is not contended on appeal that the defendant was not guilty of the alleged burglaries; to the contrary, the appellant's guilt is in effect conceded. It is urged, however, on appeal that the evidence is not sufficient to support the verdicts of guilty of first degree burglary.

It is also urged on appeal that persistent misconduct of the district attorney prevented the defendant from having a fair and impartial trial.

[1] The facts briefly are as follows: One of the offenses charged was the burglary of the home of one Alex Schwartz, on or about June 24, 1939. Mr. Schwartz testified that he lived with his wife and son in an apartment house located at 408 South Cloverdale avenue in Los Angeles; that they were home on Saturday, June 24th, until about 9:00 o'clock in the evening, when they went out until midnight; that their apartment had only one entrance

door, which was fastened with a Yale lock, and that he locked the door when they went out that night; that when they left the apartment house that evening his attention was directed to a dark "old-looking sedan", which was parked in front of the entrance door; that there was a light in front of the apartment house and that he could see very plainly a woman sitting in the car; that the apartment was being cleaned on Sunday morning, the next day, at about 11:30 o'clock, when it was discovered that his wife's fur coat and his boy's watch were missing; that he then discovered that the door to his apartment was cut where some kind of an instrument had been inserted to pry the lock back, although he had not noticed this on the occasion of their return to the apartment at midnight.

Mr. Schwartz was later recalled to the stand and he testified that the woman whom he saw in the car was "The lady with the brown coat on there in the second row", indicating a woman sitting in the back part of the courtroom. Following this testimony the lady who was pointed out was summoned to the witness stand by the prosecuting attorney as a witness on behalf of the People. She testified that her name was Miss Maxine Roberts and that she was acquainted with the defendant and had known him for about five years. The witness admitted having been driving with the defendant in the neighborhood of South Cloverdale avenue on the evening of June 24, 1939, and asserted that they had parked the car somewhere, at which time the defendant "took the dog for a walk".

There was testimony by one Sam Brill, who was employed temporarily as a furrier in a fur shop located on Hollywood boulevard, to the effect that in the latter part of June, 1939, the defendant, whom he had known for some nine months, gave him a fur coat early in the morning on the way to work, and had asked that it be taken to the manager of the fur shop and that Mr. Brill was to obtain for him (the defendant) the sum of $20 for the coat. This coat was the one belonging to Mrs. Schwartz. Mr. Brill further testified that the defendant formerly had a bookmaking place located next door to the hotel where he was living, and that they became acquainted in that manner; also, that the defendant was acquainted with the manager of the fur shop where he was employed.

The watch which was stolen from the Schwartz home was sold by the defendant to a Mr. Kliman, some time around July 1, 1939, for $4.

The offense charged in the second information was the burglary of the home of Mrs. Iris A. Soper, on or about June 30, 1939. Mrs. Soper lived in a studio apartment in Hollywood. On the evening of June 30, 1939, at about 8:00 o'clock, Mrs. Soper "put away" a fur coat and a sable fur piece in her apartment. She left the apartment about an hour later and returned at approximately 10:00 o'clock the same evening. Upon her return she found that someone had entered the apartment and that the fur coat and sable fur piece were missing. Mrs. Soper had observed the defendant "hanging around" the outside of the building in which she lived, but she did not see him the night that these furs were taken. The furs were subsequently recovered at the same furrier shop in Hollywood. Mr. Brill testified that he had received them from the defendant.

From the foregoing it is obvious that as to the second offense there can be no question as to the sufficiency of the evidence to support the verdict of guilty of first degree burglary. Nor can there be a valid question as to the sufficiency of the evidence to support a verdict of guilty of burglary of the first degree as to the first offense. The fact that the burglary was not discovered until 11:30 o'clock in the morning was a material circumstance, but it does not follow that the jury, by reason thereof, was foreclosed from finding a verdict of guilty of burglary of the first degree.

[2-4] With regard to appellant's contention that the alleged misconduct of the district attorney was prejudicial, it should be noted that no objections were made to such alleged misconduct at the trial. It is the general rule and too well settled to require citation of authority that before objection can be made on appeal, to the alleged misconduct of the district attorney, objection must first have been made at the trial and an opportunity afforded the trial judge to correct the error, if any. There is an exception to this general rule which is equally well settled, namely, that no such objection need be noted at the trial when the alleged misconduct is of such character that prejudice is bound to follow, and such prejudice would in all probability be unaffected by instructions and admonitions of the trial judge. The situation relied upon by appellant presents no such problem and is therefore not governed by the exception

to the general rule above mentioned. It is only where the guilt of the defendant is doubtful that an appellate tribunal will assiduously inquire into the whole record for the purpose of determining whether alleged misconduct, asserted for the first time on appeal, resulted in prejudicial error.

For the foregoing reasons the judgment and the order denying the motion for a new trial, in each case, are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.




## METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al. *

## SAME v. HOLMES et al.

Civ. 2172.

District Court of Appeal, Fourth District, California.

Feb. 21, 1940.

As Modified on Denial of Rehearing March 15, 1940.

See 100 P.2d 357.

1. Eminent domain ⇐134

In eminent domain proceedings, market value of land and not its value in use for a special purpose is the measure of damages.

2. Eminent domain ⇐134

In eminent domain proceedings, value of land cannot be determined by taking the costs of suggested improvements and capitalizing them on the basis of a certain return therefrom.

3. Eminent domain ⇐202(4)

In eminent domain proceedings to obtain reservoir site, it was error to admit testimony of market value determined by what witnesses thought buyer could pay and still make a profit from hypothetical projects to develop and sell water and electricity involving conjectural contingencies, including acquisition of lands, water rights, rights of way, easements, franchises, right to use private and public facilities, existence of a market for power at a fixed price and a market for water at competitive prices, procurement of financial resources, and necessity of finding a purchaser willing to undertake a particular project.

4. Eminent domain ⇐202(4)

In eminent domain proceedings to obtain reservoir site, admission of speculative opinions based upon proposed hypothetical projects for development and sale of water and electricity could not be justified on ground that the elements of remoteness and speculation affected only the weight of the evidence and not its admissibility.

5. Eminent domain ⇐222(4)

In eminent domain proceedings to obtain reservoir site, instruction referring to hypothetical projects involving use of the land, and charging that if "you find that the evidence which tends to support such projects is credible and is of more convincing force as to the economy, feasibility and practicability of such projects than is the evidence opposed to it and from which it results that the greater probability is in favor of the economy, feasibility and practicability of the project, you should so find," was error, since the only issue which should have been submitted was the market value of the land.

6. Eminent domain ⇐222(4)

In eminent domain proceedings to obtain reservoir site, instruction that market value is essentially based on assumption, not on fact, was inadequate and misleading, since such assumption must be based upon facts.

7. Eminent domain ⇐222(4)

In eminent domain proceedings to obtain reservoir site, instruction that cost of bringing water for storage in reservoirs on the land was an element to be considered in determining the value of the land was erroneous, since it invited jury to substitute its judgment for that of a potential purchaser in determining whether the lands possessed such reservoir adaptability as to affect their market value.

8. Eminent domain ⇐222(4)
Trial ⇐194(10)

In eminent domain proceedings to obtain reservoir site, instruction that if it would be necessary to bring in water from a distance in order to use proposed reservoirs, and that in doing so it would be necessary to cross other lands, jury might, in determining the feasibility of the project, assume that rights of way could be obtained from such private lands by condemnation proceedings was erroneous, as tending to minimize difficulties in connection with a remote and speculative matter and withdraw a question of fact from the jury and impose an undue burden upon the plaintiff.

* For subsequent opinion, see 116 P.2d 7.

**9. Eminent domain ⇐222(4)**

In eminent domain proceedings to obtain reservoir site, it was error to instruct jury to take into consideration the effect of possible future condemnation proceedings upon the market value of the property, since the "market value" is to be measured by conditions under which the seller is not required to sell and the buyer is not required to buy.

See Words and Phrases, Permanent Edition, for all other definitions of "Market Value".

**10. Eminent domain ⇐219**

Where eminent domain proceedings to acquire reservoir site were drawn out over a long period of time and evidence was voluminous, use of charts, copies of which were handed to jury as aids for the purpose of summarizing and collecting portions of the evidence which counsel desired to discuss, was proper, if the charts were so prepared as to fairly and accurately depict the part of the evidence purported to be covered thereby, although such charts were not admitted in evidence.

**11. Eminent domain ⇐219**

In eminent domain proceedings to obtain reservoir site, use of charts and counsel's argument that condemnor by using material taken from part of the lands in question saved 50 cents a cubic yard in hauling charges and saved 14 cents a ton mile for hauling cement, and that the savings thus effected might well dictate the market value of the lands, where there was no evidence which supported such argument, was improper, since only question at issue was the market value of the lands.

**12. Eminent domain ⇐219**

In eminent domain proceedings to obtain reservoir site, argument of landowners' counsel as to value of water which might be stored in proposed project on the lands having no basis in evidence and attempting to utilize a report introduced in evidence for another purpose was improper.

**13. Eminent domain ⇐219**

In eminent domain proceedings to obtain reservoir site, counsel's argument that cost to landowners of trying case was more than $88,000 was improper, notwithstanding that court instructed jury to effect that no allowance should be made for the cost of litigation to the landowners.

**14. Eminent domain ⇐219**

In eminent domain proceedings to obtain reservoir site, argument that cost of using lands "at our prices" was much less than any other substitute plan and less than one-half of the cost of the water which the condemnor was bringing to the site was improper.

**15. Eminent domain ⇐262(5)**

In eminent domain proceedings to obtain reservoir site, repeated statements by landowners' counsel that 3½ years had elapsed between the time condemnor decided to build its reservoir and the time suits were filed, and that condemnor thereby saved more than a million dollars in interest, and that law under which property was condemned was unjust, were prejudicial.

**16. Eminent domain ⇐219, 262(5)**

Repeated argument of landowners' counsel in eminent domain proceedings, wrongfully charging that condemnor had accused landowner of fraud in connection with sale of portions of land some years before the action was filed, which charge was not material to any issue and which was emphasized by instruction on fraud, was prejudicial misconduct.

**17. Eminent domain ⇐262(5)**

Argument of landowners' counsel in eminent domain proceedings injecting into the case influence, power, and terror that could be exerted by a large wealthy corporation, such as the condemnor, and appealing to the jury to vindicate a landowner upon a supposed charge of fraud, was prejudicial.

**18. Eminent domain ⇐255**

Where condemnor in eminent domain proceedings did not in each instance request the court to instruct jury to disregard alleged improper argument of counsel, but made objections in many instances, and landowners' counsel stated at conclusion of argument that condemnor might note in the printed record any exception desired, condemnor on appeal was not precluded from complaining of the misconduct of counsel.

**19. Eminent domain ⇐222(5)**

In eminent domain proceedings to obtain a reservoir site, instructing jury to allow interest at 7 per cent. from date of taking possession of lands to date of entry of judgment on amounts found as the value of the respective parcels was error.

---

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Consolidated actions in eminent domain by the Metropolitan Water District of Southern California, a municipal corporation, against E. Bennett Adams and others, and Lawrence Holmes and others. From judgments in accordance with jury's award in favor of defendants, plaintiff appeals.

Reversed and remanded.

James H. Howard, Arthur A. Weber, Charles C. Cooper, Jr., Donald M. Keith, Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, for appellant.

Miguel Estudillo, of Riverside, Oliver O. Clark, of Los Angeles, and C. L. McFarland, of Riverside, for respondents.

BARNARD, Presiding Justice.

These are actions in eminent domain. The plaintiff, engaged in constructing an aqueduct in connection with the bringing into the state of water from the Colorado river, sought to condemn certain lands required by it for reservoir purposes in what is now known as the Cajalco reservoir, situated in Riverside county. The lands required for this purpose embrace 526 parcels, with a total of more than 8,000 acres, and the reservoir was designed to hold some 225,000-acre feet of water. The trial here in question, in which these two actions were consolidated, involved fifty-eight of these parcels of land, was had before a jury and lasted exactly a year. During the trial the plaintiff acquired thirty-six of these parcels and after judgment acquired two more, leaving twenty parcels which are involved in this appeal. The main controversy here relates to ten of these parcels, totaling 862 acres, owned or controlled by the defendants Holmes. The defendants claimed that portions of each of these parcels formed two areas which were specially adapted for use for reservoir purposes, the two areas covering something over 400 acres.

While this appeal is presented upon a bill of exceptions the record, including exhibits, is voluminous. In the interest of brevity references herein to the evidence must be by a general summary, in most instances, rather than by going into details. The defendants presented five witnesses who qualified as what we may call real estate experts, but who testified that they knew nothing concerning the values of the lands for reservoir purposes. They considered the highest and best uses of these ten parcels, which may be referred to as the reservoir parcels although only portions thereof were suitable for the reservoir use claimed by the defendants, as their use for agricultural and subdivision purposes. The defendants also produced three engineer witnesses who testified that they knew nothing of the value of these lands other than for reservoir purposes and who considered their adaptability to such purposes as their highest and best use.

With respect to the ten parcels mainly involved here the defendants' engineer witnesses testified that there are thereon two natural reservoir sites, one capable of holding 3,500-acre feet of water and the other 8,500-acre feet; that to use these reservoir sites it was necessary to bring water in from outside sources as no considerable water was available in that water-shed; that a demand and market for such reservoir sites was to be anticipated in the reasonably near future; and that such use of these portions of the lands constituted their highest and best use. In support of the claim that such a market for lands adapted to reservoir use existed these witnesses were allowed to outline in the greatest detail four projects which they considered feasible, economically and otherwise, for the bringing in of 12,000-acre feet of water to be stored in these two proposed reservoirs and then sold for irrigation purposes, the projects including the use of the water en route at some four or five points for the purpose of developing electrical energy which was also to be sold. These projects involved bringing the water various distances ranging from twenty to thirty-five miles.

These four projects may be generally described as follows: 1. Arrowhead. It was proposed to acquire from the Arrowhead Corporation whatever water rights it has in the upper Mojave basin on the other side of the San Bernardino mountains from these lands; to adjust the claims of those now using the waters of the Mojave river; to acquire from the Arrowhead Corporation and complete certain uncompleted tunnels and works which it was asserted could be used to divert this water into Lake Arrowhead; to acquire from the Arrowhead Corporation the right to so raise the existing dam which creates Lake Arrowhead as to permit an additional storage in said lake of 25,000-acre feet of water, including the right to flood the lands surrounding the lake to the extent necessary to effect such additional storage; to bring said water from Lake Arrowhead to the San Ber-

nardino valley by tunnels and penstocks and through four proposed power houses; and to then conduct a part of this water to these proposed reservoirs by conduits and by obtaining the permission of a private corporation to enlarge and use an existing canal owned and used by it. The cost of this project was estimated at from $4,000,000 to $4,372,500. 2. Rock creek. This was a somewhat similar project, in which it was proposed to divert sufficient water from Rock creek; to temporarily store such water in two proposed reservoirs on the northerly slope of the San Gabriel mountains; to convey the water through an open ditch and through a tunnel to be driven through the mountains to Cajon creek; and then to take this water through this creek, through various power houses, and through various conduits to the proposed reservoirs in question. This project was estimated to cost $6,125,373. 3. Mojave. In this project, estimated to cost from $7,052,750 to $8,264,600, it was proposed to bring 40,000-acre feet of water from the Mojave river through the San Bernardino mountains. 28,000-acre feet was then to be sold in the San Bernardino valley and the remaining 12,000 feet taken on to the reservoir sites in question, the water being used on the way to develop electrical power at various proposed power houses. 4. Warm creek. This was a more modest project, estimated to cost from $2,400,000 to $2,509,650. It involved the annual diversion, during the rainy season, of 12,000-acre feet of water from Warm creek, a tributary of the Santa Ana river, and the taking of this water through canals belonging to a private corporation and to the Riverside Water Company to the reservoir sites in question.

These witnesses fully described these projects which they said would be considered by a prospective purchaser of the reservoir lands in question, giving estimates of the cost of acquiring the necessary water and other rights, the cost of constructing various items of the proposed projects and the annual cost of operating the projects, and assuming that money could be borrowed for the purpose of constructing and putting through the projects at a named rate of interest. They also presented figures showing the exact amounts that could be received from the sale of electrical energy at a definite and fixed price and the amounts that would have to be received from the sale of water stored in these reservoirs in order to make the whole enterprise profitable. In making these assumptions, in the case of each project, they allotted a price of $700,000 to $738,500 for the purchase of the two reservoir sites on the Holmes land, including this purchase price as a part of the cost of the proposed project. Having thus supported their claim that these two areas were available as reservoir sites, that a market or demand therefor existed and that their use for that purpose was economical and otherwise feasible, two of these engineer witnesses then testified that the market value of these two areas, comprising the proposed reservoir sites and constituting a portion of each of the ten parcels now in question, was from $715,000 to $738,500. One stated that the market value of the portion of the lands owned by the Holmes which included the two reservoir sites was $715,000, that this portion consisted of 417 acres which he valued at about $1,715 an acre, and that of this he valued a part at $3,000 an acre, a part at $5,000 an acre, and a part at $1,500 an acre. The other valued the area within the two reservoir sites, about 400 acres, at $738,500, "so far as Mr. Holmes owns the basin lands". The third engineer witness valued all of the Holmes land at $700,000.

Some excerpts may be given to illustrate the nature of the testimony of the engineer witnesses and upon which their opinion as to the market value of portions of these parcels was based. One witness, in describing the Arrowhead project, said in part:

"The cost of pumping figured at eight mills would be $37,570, as an annual charge. The cost of installation, which takes me clear down to the Temescal Canyon, is $506,000. That is included in my four million dollar estimate. The Gage Canal would be used from its intake to practically its end as such—a distance of approximately 13 miles. There would be no expense involved in the use; there would be an exchange.

"As to the length of conduit, in addition to the tunnels, there is a 3,000 foot penstock line to a power house. A penstock is the pressure pipe that leads from the forebay of the power house down to the turbines. Then there are 8200 feet of conduit to another penstock; then 19,400 feet; then 9,000 feet of penstock; then 10,750 feet of conduit; then 21,500 feet which takes it up to the intake of the Gage Canal, and then 2300 feet of conduit from the Gage Canal up to the Holmes' reservoirs. Then there would be 2400 feet of extension for the

Gage Canal, which would make a total of 85,550 feet of conduit, or roughly 16½ miles.

"The breakdown of my elements of expense involved in connection with this project, first—the acquisition of the Arrowhead rights, $200,000; the completion of the Arrowhead project; the completion of the Deep Creek tunnel and increasing the dam, $287,500; then the power drop pipe line and the outlet tunnel of 9,000 feet is $1,258,750. That takes us to the Gage Canal. From there into Cajalco and over the summit out of Cajalco down into Temescal Wash, $506,000 additional. These items, with the exception of the acquisition of the Arrowhead rights, are taken inclusive of 25%. That makes a total up to that point of $2,052,000, which leaves $1,747,750 for the Cajalco reservoirs and dam sites and the cost of construction of the two dams there."

With reference to the Gage Canal, to which he referred, this witness further testified: "I think an exchange could be worked out. This water will be used in Orange County, and there has been a 'dicker' on for several years, an interpretation of a contract there, and I think that could be straightened out in this exchange. That would be one of the factors that would have to be considered by my prospective purchaser unless he would want to enter into some payment with the Gage Canal Company. That would depend upon future negotiations, the result of which at the present time would be unknown."

In speaking of the proposed Mojave project, he said: "The establishment of the two dams and reservoirs at the Cajalco site is but a part of another program of enterprise. It is the terminal storage on the Mojave project and is the terminal storage of only a portion of the water from the Mojave river. In other words, I propose to bring 12,000 feet of that 40,000 acre feet diversion to the Cajalco reservoir."

He further testified:

"I am presupposing that a purchaser would buy the Holmes lands and pay $715,000.00 for them for the purpose of tying in with the Mojave project that I have spoken of. That valuation is based upon an assumption that it would be an economical project and a profitable one." * * *

"I am basing my estimate of value, as I said I did with reference to the Mojave project, upon the ability of some one to purchase not only the Holmes' sites and dam sites and construct those dams and to pay the price I have mentioned, but on his ability also to procure this water and profitably conduct the enterprise. * * *

"My statement as to market value presupposes a particular purchaser who would pay $715,000 for the Holmes' reservoir sites and dam sites, and that he would buy those dam sites and reservoir sites as a part and parcel of a large enterprise involving a large expenditure of money; that he would buy the property and pay for the property that particular price because of his particular ability to acquire water on it at a particular price and at a particular expenditure. He might have in mind the consideration of the possible difficulties that might exist in the obtaining of the water. I think he would be convinced the difficulties are not insurmountable; some might be imaginable."

Another witness testified: "The total cost for my Mojave project is $6,225,373. The project will produce 6,375,600 kilowatt hours per year on an average to the Edison Company plant; 4,900,000 kilowatt hours at the Fontana; and at the Narrows, 13,925,400 kilowatt hours; selling at five mills would produce $126,005. I figured an annual depreciation of $62,254, or 1% straight line depreciation. I figured the yearly operation to be $70,000. I figured 4½% interest on a municipal organization at the present market; that is an organization which has a taxing power. I figured my customer for the Holmes' land might be a private corporation or a public corporation. If it were a sound, private corporation they obtain their money at 4½%, so it would make no real difference. The interest item was $280,142. The depreciation fund is invested in either retiring—if they have any securities out bearing interest, and of course, to amortize the debt and also figure the depreciation, would be figuring the same thing twice, so that cannot be repeated in this calculation. The $70,000 covers operation, maintenance, salaries of officers, current repairs, and there are no other items of expense. * * * My gross figure from the sale of power is $412,396, and subtracting the cost would give a net of $286,391, which is the amount of money I would have to get from the sale of water without giving the project any profit per annum. This divided by 12,000 acre feet of water would mean that the net cost of water delivered without distribution facili-

ties to any of the users would be about $23.80 per acre foot for firm water."

And further: "In my figures to which I have testified relating to the Mojave project, we allowed $300,000 for the acquisition of water rights in the valley in addition to the $250,000.00 to the Lake Arrowhead Company, and we then added a million dollars for profit on the two reservoir sites and dam sites, of 8500 and 3650 acre feet capacity, respectively."

There was evidence that permits would have to be obtained from federal and state authorities before any of the four proposed projects could be undertaken, and it was frankly admitted that there were many existing private rights and interests which would have to be acquired or settled with in order to put through any of the proposed projects. One witness testified: "The cost of acquiring water rights (Mojave Project) is included in the figures I have already given you. It would cost $300,000.00, which is not exactly for water rights. I believe it would be desirable to expend about that sum to prevent any unfounded objections, because the water is really surplus water, but many people object even to taking that. It is for that sort of thing either for litigation or for paying for water rights."

A report introduced in evidence concerning water development in the Mojave Basin, contained the following: "The physical situation encountered in creating the greatest possible use would be complicated even if no development now existed, but when the necessities of existing city and irrigation developments are considered and also the at present unused legal rights to water involved, the situation is extremely complex."

And another witness testified: "I think it would be prudent for my prospective buyer to iron out all of these difficulties before he buys the Holmes' land. He would want to satisfy himself as to the availability of that water before he pays $700,000 for the reservoir site on the property."

It may be here noted that these witnesses not only assumed, in connection with their proposed projects, that the necessary water rights and reservoir sites therein contemplated were procurable, but they assumed that these could be obtained at figures which are quite small in comparison with the amounts allotted to similar purposes in putting into use the two reservoir sites on Mr. Holmes' land. For instance, they assume they could acquire both the lands needed for reservoir purposes and the necessary water rights in their proposed projects at about $125 an acre while they allowed more than $1,700 an acre for the Holmes land without any water rights.

The first of these engineer witnesses testified in general as to the adaptability of certain portions of these lands for reservoir purposes, to the fact that water was available for storage therein, that a market and demand existed, and then gave his opinion as to the market value of the areas especially suited for reservoir purposes, being portions of the ten parcels now in question. In the case of this witness the testimony along the lines above referred to, as to the feasibility of certain of these proposed projects for the purpose of bringing in water to store in the proposed reservoirs, with the cost thereof and the income therefrom, was brought out upon cross examination by the plaintiff. In the case of the other two witnesses these matters were gone into upon their direct examination by the defendants. In each instance, objections were made to the expression of an opinion as to the value of these lands for these purposes and of the market value of the lands, which were overruled. Motions to strike were also made upon the ground, among others, that the opinions of value were based upon inadmissible evidence of matters which were too remote and speculative to be considered by the jury or to justify the expression of an opinion of value which was, in fact, based thereon. These motions to strike were denied.

Generally speaking, the ten parcels which included the two claimed reservoir sites contained some 862 acres, about 400 acres of which were said to be especially suited for reservoir purposes and which were included in the four projects proposed by the defendants. The total value given to these ten parcels by the defendants' real estate experts ranged from $211,000 to about $374,000. The defendants' engineer witnesses valued these ten parcels at more than $700,000. The jury allowed for them $507,305, exclusive of an allowance for interest. The court entered judgments in accordance with the jury's award and the plaintiff has appealed.

A number of points raised by the appellant relate to errors in connection with the admission of evidence, and the submission of the same to the jury, in connection with

the claimed existence and feasibility of use of two smaller reservoir sites upon a portion of the property involved, and may be treated together. In this connection it is contended that the respondents were erroneously permitted to present for the consideration of the jury a valuation of their properties contingent and based upon the realization of anyone of four highly speculative, remote, conjectural and hypothetical projects for the development and sale of water and electrical energy; that these proposed projects were too remote and speculative because, among other things, they were presented to the jury as prospective sources of profit which would result from the sale of electrical energy at a fixed rate and the sale of water at competitive rates, and because each of these projects involved the acquisition of lands, water rights, rights of way, easements and franchises and the right to use other privately and publicly owned facilities and each was, moreover, dependent upon the discretionary action of state and federal authorities; that each of the respondents' valuation witnesses were not qualified to express an opinion on the market value of the lands because each admitted that he knew nothing about their value except for one purpose; that testimony was erroneously admitted expressing in terms of money the values of the parcels for particular uses; that testimony was erroneously admitted of the aggregate value of the combined portions of several parcels which were claimed to be adapted for reservoir use, and other testimony of the aggregate value of the other portions of these parcels for which no reservoir use was claimed; and that the court erred in overruling the objections to the admission of evidence to the effect that under the four proposed projects water could be furnished to consumers at a rate which the consumers could afford to pay and as low as any water which was available to such consumers, to evidence comparing the cost of developing water storage at Cajalco to the cost of such storage in 225 other reservoirs in southern California, and to evidence of specific plans and figures in connection with the four proposed projects in a manner to visualize them for the jury as completed and working projects.

The respondents contend that the market values of these lands, as testified to by their engineer witnesses, were not contingent or based upon their testimony relating to these four proposed projects; that the opinions as to market values expressed by these witnesses were not based upon the realization of any remote or speculative project but were opinions on market values given by qualified witnesses, taking into consideration the highest and best use for which the particular land was available, namely, its use for a reservoir site; that the witnesses merely considered this use as one that an informed buyer would reasonably consider in arriving at a price he would be willing to pay; and that these witnesses merely gave the evidence to which we have referred to show that a demand for such reservoir sites existed, that these lands were economically and practically adapted to such a use, and that there was a reasonable probability that such projects were feasible and that the lands could reasonably be expected to be required for that purpose within a reasonable time. It is argued that the evidence of the cost of such proposed projects and of the probable cost to consumers of water and electrical energy were admissible as showing the feasibility of using these lands for other reservoir purposes and the probability of an early demand for that purpose. It is further argued that, in any event, the matter of remoteness and speculation in connection with these proposed projects affects only the weight of the evidence and not its admissibility.

In support of their contention that the evidence in question was admissible the respondents particularly rely upon McCandless v. United States, 9 Cir., 74 F.2d 596; Id., 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 and City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228. The McCandless case involved land situated in the Territory of Hawaii. There was evidence that a portion of the land which the government sought to condemn was suitable for the raising of sugar cane if water could be made available. The landowner offered to prove that he owned other land some eight or ten miles away which produced ample water; that it was practical and economically feasible to transport such water to the land in question; that the bringing in of such water could be anticipated with reasonable certainty; and that the cost thereof would be less than the cost of furnishing water to similar lands. The court rejected this evidence as too remote and speculative and instructed the jury it must disregard any possibility of bringing outside water to the land in ques-

tion, except as such water might be brought from an adjoining tract owned by the same owner. Upon appeal the court pointed out the usual rule that the most profitable use to which land can probably be put in the reasonably near future may be shown and considered by the jury as bearing upon its market value, and after saying that any incompleteness or insufficiency in the offer of proof with respect to the cost of the improvement and the increased value of the land, as suggested by the government, could probably be remedied by additional evidence if necessary, held that the offered evidence related to the value of the land when used for a purpose to which it could probably be put and that its exclusion was prejudicial error. In that case the owner of the land sought to be condemned owned the water supply and sought to prove that it was feasible to bring it to the land in question for use thereon. The court held that such evidence was not too speculative or remote and further intimated that the cost of making the improvement might be shown. Aside from the question as to the weight that should be accorded to this decision in this state, it seems apparent that the instant case involves a degree of remoteness and speculation much greater than the one there being considered. Apart from any other consideration, there is a wide difference between permitting evidence of the cost of reasonably possible improvements to land, through such things as providing for the irrigation or drainage thereof, and permitting evidence of the cost of large and hypothetical projects for purposes not directly connected with the land, which may incidentally involve using the land as a part of the greater scheme. In the instant case, the proposed projects which were so clearly pictured to the jury involved many remote and conjectural contingencies, including the existence of a water supply, the right to remove it to another water shed, the acquisition of reservoir sites and sites for power houses and rights of way for canals and transmission lines, some but not all of which were on public domain, permits from state and federal authorities, the right to use public highways and the facilities of other companies, the existence of a market for power at a fixed price and a market for water at competitive prices, the procuring of financial resources and the investment of several millions of dollars, the element of possible profits therefrom, and the necessity of finding a purchaser willing to undertake a particular project of that magnitude.

In City of Stockton v. Ellingwood, supra, the trial court had refused to strike out testimony as to values which were claimed to be based upon improper considerations by which the witnesses had considered the lands in connection with their use as a part of a completed project. The evidence showed that in considering the availability of lands for reservoir purposes some of the witnesses had testified that it was possible by constructing works to use these lands as reservoir sites, storing water for use in irrigation, and that they believed projects could be developed which would include the use of these lands for reservoir purposes. The court pointed out that even though, as the appellant claimed, "the experts were inclined to envisage a completed project, in testifying as to the adaptability of the properties concerned for reservoir purposes," it was also true that "the record contains only general testimony as to the demand for reservoir sites, and no specific testimony indicating a present demand for the particular reservoir site in question", and that "no witness attempted in this case to figure out the profits of the enterprise". [96 Cal.App. 708, 275 P. 235, 242, 243.] The court there held that while portions of the testimony of certain witnesses might well have been stricken, no prejudicial error had resulted from the refusal to strike out the opinions of value given by the witnesses for the reason that the action was tried by the court without a jury and, in effect, because it might be assumed that the court had disregarded such small parts of the evidence as were improper. See discussion of that case in Temescal Water Co. v. Marvin, 121 Cal.App. 512, 9 P.2d 335. That case cannot be considered as controlling in such a case as the one now before us, where a mass of specific and definite testimony as to the use of the lands in question as a part of completed projects was submitted to the consideration of the jury, including not only detailed estimates of costs and running expenses but the profits which could be expected, based upon fixed rates of interest and prices for electrical energy and upon the sale of water, only about a third of which was to be stored upon the lands in question.

While holding that the adaptability of land to certain uses may be shown, the El-

lingwood case in general effect opposes rather than supports the proposition that specific supposititious projects involving the use of the land may be outlined to the jury with detailed estimates of the cost thereof and of the profits that may be made therefrom. The trend of authority in this state is also to the contrary.

In San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 P. 977, 981, 11 L.R.A. 604, it is said:

"The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad, and rolling stock necessary for the operation thereof, in fixing the value of land condemned for railroad purposes. * * *

"The question was not what the property was worth to a person intending to acquire it and the dam-site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself; in other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with bona fide purchasers generally, but its necessities cannot be taken advantage of. * * * The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands (Boom Company v. Patterson [98 U.S. 403, 25 L.Ed. 206], supra); but to attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose the cost of operation, prospective sales, and estimated profits, increased demands through growth of population, etc., * * *."

In Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224, 227, after saying that a free investigation should be permitted as to the adaptability of the land to the purposes to which it is naturally adapted, the court said: "Such proof should be limited to showing the present condition of the property, and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise." In that case the court further said: "the present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn it". In Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, 981, we find: "It is seen, therefore, that this court by its latest utterances has definitively aligned itself with the great majority of the courts in holding that damages must be measured by the market value of the land at the time it is taken, that the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use."

In Canal & Irr. Co. v. Stevinson, 63 Cal.App. 767, 220 P. 427, 428, a judgment in favor of the landowner was reversed on the ground that the trial court had erroneously permitted "the defendant to present a proposed elaborate scheme for the reclamation and irrigation of the land, including the details and estimated cost thereof and the cost of the annual maintenance of the same". The court there said: "We conclude that the introduction of testimony of a proposed scheme of improvement, such as was shown in this case, is not proper for the purpose of showing the adaptability of the land * * *." And, also, "In view of the character of the testimony thus admitted, its importance and its probable effect upon the minds of the jurors, we feel that substantial injury resulted to plaintiff and that a new trial of the action should be had."

In City of Stockton v. Vote, 76 Cal.App. 369, 244 P. 609, 621, a judgment in favor of the landowner was reversed on similar grounds, the court having admitted rather detailed evidence of suggested projects involving the use of the land. The court there said: "From these reports and the testimony of the experts, the entire project was before the jury as clearly as could be in the form of a completed enterprise. The dam was there before them, 200 feet in height, canals on either side of the river came into being, conducting water down to a point near Jenny Lind, where, through penstocks, the water was being dropped from 200 to 250 feet upon waiting water wheels, which, in turn, gave motion to great dynamos, producing a current carrying light and heat to thriving cities in the valley while the impounded waters, having discharged this duty, were carried forward through diverting ditches to some 34,000 acres of lands lying below the foothills at an approximate cost of $42 per acre, a limited portion of the water being taken through conduits to the cities needing impounded water for municipal purposes, the cost of the enterprise being gradually written off by the revenue derived from the sale of the impounded waters for power and irrigation purposes. It is true, that this picture existed only on paper, but the reports referred to enabled the jury to visualize the speculative project as an actuality and measure the market value of the flowage easement sought over the defendant's lands according to the standard thus presented."

And also: "A reference to the testimony which we have heretofore set forth and the predicate contained in the questions asked, as well as the answers of the witnesses, show that their estimated market value of the land was really an estimate of what they thought the land was worth for a specific purpose."

Somewhat similar rules of law were applied in the case of City of Oakland v. Parker, 70 Cal.App. 295, 233 P. 68. In East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 480, 279 P. 178, the court said: "The defendant was permitted to show the volume of water flowing in the Mokelumne river, the capacity of the Lancha Plana reservoir, and the capacity of a reservoir which could be constructed in the Arroyo Seco basin, the amount of electric power which could be developed, the irrigable lands in need of water, the cities and towns, including those in the plaintiff district, which could be supplied with water and power from such a combined reservoir system and the amount now consumed by them, the available use of the system as a means of flood control and of protecting the delta lands of the Sacramento and San Joaquin rivers against salt water. The defendant was not permitted to show the present selling prices of water and power, the increase in the market value of the irrigable lands mentioned which would result from a 'dependable water supply,' the increase in value of delta lands which would be caused by holding back the salt water, and other evidence tending to show the returns to be received from the sale of water and electric power. The defendant sought to make such proof by his own witnesses and by cross-examining plaintiff's witnesses. * * * But the relation between the value of land in a proposed reservoir and the current price of water and electric energy is too remote and conjectural to be of any reliable assistance to the jury in determining the market value of the land taken. Although the evidence rejected consisted of proof of past and present facts, the inference sought to be drawn therefrom is highly speculative. Speculative and conjectural calculations of prospective receipts and expenditures and consequent profits to be derived from a prospective enterprise not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead the minds of the jurors. * * * The admission of evidence which leads to conjectural speculations is equally harmful, whether on cross-examination or direct."

In East Bay Mun. Util. Dist. v. Lodi, 120 Cal.App. 740, 8 P.2d 532, 540, it is said: "The testimony of the appellants' witnesses as to damages estimated the cost of appellants' project and then the sale of energy developed by the project. A quotation from the answer of one of the witnesses will suffice as an illustration of the basis adopted by all of them, to wit: 'I capitalized the values that were there. I arrived at this value by assuming that the plant would cost $363,300.00, and that the sale output of energy would be at the rate of 4½ mills per kilowatt, and then capitalized this net profit at 8 per cent, and the sum which invested at 8 per cent would yield the amount of net profit, fixed the market value.' We have paraphrased the witnesses' answer slightly in order to

shorten the same. That this basis of fixing the damages is incorrect is a settled law of this state."

[1] The test in such a case as this is the market value of the land and not its value in use for a special purpose. The issue here was what the land was worth at the time in question and not what it would be worth as part of a future development after millions of dollars had been spent in making it available for such particular use.

Nearly all of the rules of law set forth in the cases above cited were violated in submitting the evidence in this case to the consideration of the jury. Elaborate prospective schemes for large developments and expensive works, with detailed plans of construction and estimates of cost, including the cost of operation of the completed projects and the rate of interest to be paid on money borrowed, with the amounts of water and power expected to be developed, with the prices to be received therefor and the profits to be realized therefrom, were outlined at great length. The uncertainties and difficulties involved in obtaining water rights, rights of way, and the permission of governmental agencies were minimized and brushed aside. The value of property in use for a particular purpose to the owner or to his prospective purchaser was shown in dollars and cents. A complete picture of the proposed projects was given, by which they were visualized before the jury as completed projects operating at fixed costs and selling water and power at prices which were not only established, but sufficient to return a large profit on the entire investment. One witness even figured for the jury a profit of a million dollars on the enterprise after allowing a stated price for this land, which amount he later gave as its market value.

It plainly appears that the market values thus testified to were what these witnesses thought a buyer coud pay for the property and still make a profit. One witness specifically stated that he was presupposing that a purchaser would pay $715,000 for the Holmes land for the purpose of tying it in with one or more of the proposed projects and that his figure of $715,000, which he gave as the market value, was based upon the ability of someone to purchase a part of the Holmes land at that price and after constructing the works he suggested to "profitably conduct the enterprise."

[2, 3] The testimony of these witnesses clearly shows, as said in City of Stockton v. Vote, supra, "that their estimated market value of the land was really an estimate of what they thought the land was worth for a specific purpose." As pointed out in the authorities above cited, the settled law of this state will not permit a witness to arrive at the value of land by taking the costs of suggested improvements and capitalizing these on the basis of a certain return therefrom. While the witnesses here did not use the word "capitalize", it is rather clear that they did just that.

The evidence of the value of this land for a specific use in connection with prospective enterprises, which was submitted to the jury, involved a consideration of many elements which were exceedingly remote and highly speculative and conjectural. As was said in East Bay Mun. Util. Dist. v. Kieffer, supra, such calculations "not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead the minds of the jurors."

The fact that it took nearly a year to try the one issue as to the market value of this land, the main controversy involving only about 400 acres, is, in itself, suggestive of what must have occurred and what actually took place. The greater part of the time appears to have been devoted to the introduction of testimony along the lines above suggested. In addition to that, voluminous reports and a great deal of testimony were introduced relating to water conditions over a large part of southern California. One of respondents' engineer witnesses even gave the annual rainfall over a period of many years at a point near Los Gatos, in the Santa Cruz mountains. While, admittedly, this was done in error the explanation of the witness as to why he made the error and what he intended thereby constitutes one of the highlights in legal literature. The fact that certain witnesses, having knowledge of the value of the land for only one purpose, gave a detailed valuation to an area made up of portions of many parcels which were being submitted to the jury as separate parcels while other witnesses, having knowledge of val-

ues of the land for other purposes and uses only, gave their estimates of the value of the entire parcels would have a tendency to add to the confusion which must have existed in the minds of the jurors, but need not be further considered here.

In our opinion, the record discloses a situation where the market values testified to by these witnesses rested upon elements so remote and speculative that it should not have been submitted for the consideration of the jury. Both the opinions of value thus given and the testimony along the lines above mentioned, upon which such values were based, should have been stricken and not allowed to be considered by the jury.

[4] Nor do we think, as the respondents argue, that the elements of remoteness and speculation, to which we have referred, affect only the weight of the evidence and not its admissibility. In San Diego Land, etc., Co. v. Neale, supra, the court said: "But we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether." In City of Stockton v. Ellingwood, supra, the court says that if "it appears to the court that the witnesses' testimony is based upon improper considerations, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury". In Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 28 P. 681, 682, after pointing out that it is permissible to show the uses for which lands are adapted, the court said: "Nor would this rule, as supposed by respondent, justify the admission of speculative opinions based upon the necessities of the plaintiff, or what the plaintiff could afford to give for the land rather than to do without it. If it should appear, during the course of the examination, that a witness had given an opinion as to value formed upon any such considerations, it would be the duty of the court to strike such opinion evidence out, as resting upon an illegal and improper basis." We think the same rule applies if the opinion as to value is based upon the value of the property for a particular use to the owner or for a particular purpose to a purchaser from the owner.

[5-9] The appellant attacks certain instructions as erroneous and as emphasizing portions of the evidence which were improperly received and submitted to the jury. Only a part of these assignments will be here mentioned, these being referred to by the numbers used in the briefs. In number 2E, after referring to the several projects proposed by witnesses for the defendants, involving the use of a portion of these lands, the court told the jury that if "you find that the evidence which tends to support such projects is credible and is of more convincing force as to the economy, feasibility and practicability of such projects than is the evidence opposed to it and from which it results that the greater probability is in favor of the economy, feasibility and practicability of the project, you should so find". The only issue which should have been submitted to the jury was the market value of the land in question. This instruction should not have been given for the reasons already indicated and because it tended to center the attention of the jury upon a collateral issue. Instruction number 20, which related to certain elements going to make up market value, contained the following: "The court further instructs the jury that market value is essentially based on assumption, not on fact." While, technically, it may be true that the element of assumption plays a part in arriving at market values in cases of this kind, such assumption must be based upon facts and this portion of the instruction was both inadequate and misleading. Ordinarily, in cases of this nature, a jury may be trusted to sufficiently indulge in assumptions, without its being specifically invited to excuse the absence of facts. In instruction number 27, the jury was told that the cost of bringing in water for storage in reservoirs upon this land "is an element to be considered by you in determining the value of the land here involved". This is subject to the same objection as instruction number 2E, both of which invited the jury to substitute its judgment for that of a potential purchaser in determining whether the lands possessed such reservoir adaptability as to affect their market value. Instruction number 28 told the jury that, in the event they found from the evidence that it would be necessary to bring in water from a distance in order to use the reservoirs on this land and that in so doing it would be necessary to cross other lands, they might, in determining the feasibility of the project, assume that rights of way could be obtained from such private lands by condemnation proceedings. This not only tended to minimize

the difficulties in connection with a remote and speculative matter but withdrew a question of fact from the jury and imposed an undue burden upon the appellant. In instruction number 29, the jury was told that "to the extent that probable demand by prospective purchasers or condemnors affect market value it is to be taken into account by you in determining the market value of the property here involved". Market value is to be measured by conditions under which the seller is not required to sell and the buyer is not required to buy, and it was error to instruct the jury to take into consideration the effect of possible future condemnation proceedings upon the market value of the property.

[10, 11] The appellant assigns error in a number of instances in connection with matters placed before the jury during the arguments by counsel for the respondents, as being both erroneous and without support in the evidence. We will consider only a part of these matters, and these briefly. Complaint is made of certain charts and tabulations which were shown to the jury during the argument, smaller copies of some of them being handed to the jurors. Although these charts were not admitted in evidence we can see no objection to the use of such aids for the purpose of summarizing and collecting portions of the evidence which counsel desired to discuss, in a case in which so much time had elapsed and in which the evidence was so voluminous, provided such charts were so prepared as to fairly and accurately depict and state the part of the evidence purported to be covered thereby. In a number of instances here, however, the charts so used misstated the evidence and stated matters not in evidence. Through these charts, and also by one of respondents' counsel in his argument, the jury was told that the appellant, in building the dams for its Cajalco reservoir, used 1,333,000 cubic yards of material taken from a part of the Holmes lands, that the appellant had thereby saved 50 cents a cubic yard in hauling charges and had also saved 14 cents a ton mile for hauling cement, and that "just taking the saving and the cost of the building of the dam due to the proximity of this quantity of material on the Holmes lands, it results in a saving of $665,000", and that such saving "may well dictate the market value of that property, $665,000 for only 100 acres of land—the material contained in it". The question at issue was the market value of the land and the cost to the appellant of building a dam in connection with the use of the land which was being condemned had no connection with that issue. There was, moreover, no evidence in the record which supported such an argument. The respondents argue that any error in this was harmless because the highest value found by the jury for any of the land was $1,000 per acre, and that the jury valued the particular land from which these materials were taken at less than the amount the appellant saved in hauling.

[12-14] In another instance the jury was told that 700-acre feet of water from the Holmes Basin, taken at $450 an acre foot, was worth $315,000. There was no evidence that water was worth that much. In fact, one of respondents' engineer witnesses testified that water could be delivered at that point by one of his proposed projects for about $23.80 per acre foot. What was here attempted was to utilize a report which was put in evidence in which the author capitalized the value of both land and water in another connection and under entirely different circumstances and for another purpose. As used here, the statement was both improper and misleading. Again, the jury was told by one counsel for the respondents that the cost to the respondents of trying this case was more than $88,000. This was, of course, highly improper and although the court, in finally giving its instructions, included one to the effect that no allowance should be made for the cost of this litigation to the respondents it may well be doubted whether the prejudicial effect of giving such information to the jury could be entirely removed. One counsel for the respondents further told the jury in his argument that: "The cost of using our reservoir lands at our prices is much less than any other substitute plan, and is less than one-half of the cost of the water which the Metropolitan is bringing here." The impropriety of such argument is too obvious to require comment.

[15] Respondents' counsel repeatedly stated to the jury that 3½ years had elapsed between the time the appellant decided to build its reservoir at the Cajalco location and the time these suits were filed. Not only did this fact, if it was a fact, have nothing to do with the issue submitted to the jury but it was further used as a basis for an argument that the appellant had thereby saved more than a million dollars in interest. One counsel said in his argu-

ment: "Mr. Morgan also forgot to remind you that during this period of benevolent waiting to bring this suit the District saved about $1,250,000 on interest alone. The District, by waiting three and a half years, ladies and gentlemen, did not have to put out the money for the construction of that project which their own estimates show is over $9,000,000. They did not have to dispose of the bonds which carry, I think, four or five per cent interest. They did not have to pay that interest, and they saved it."

Another counsel told the jury the filing of the action was purposely delayed "because it would save them over a million dollars in interest." It was further argued to the jury that the appellant "is a self-liquidating corporation", and that it is common knowledge that appellant's project is being "financed by money that is being furnished by the U. S. Government." It was argued to the jury that the law under which the appellant was condemning this land is iniquitous and unjust. One counsel told the jury that Mr. Holmes was compelled to give up his land without his consent "because they had a right to take it at a price far less that its market value." Another counsel said in his argument: "* * * let me say now that this corporation plaintiff in this case has the support, if Your Honor please, of what I call the most iniquitous law, the most unjust law that has been put in our statute books for years and years. What do I mean? Am I using strong language? Let me tell you: let me start, first, and briefly give you a history of this condemnation law. Long back in the days, when we didn't have these $200,000,000 corporations the law was such that your land could not be taken away from you until they paid you just compensation for that land. That is true. I appeal to the constitution before it was amended, as it has been in 1914 and 1928. You can call for that constitution and it will bear me out in that remark. And that is true in other states of this Union where the land cannot be taken away from the landowners until the compensation is paid." The objectionable nature of the matters above referred to is so apparent as to require no comment, and in an action tried before a jury it can hardly be held that their cumulative effect was other than prejudicial.

[16] In other parts of their arguments counsel for the respondents were guilty of misconduct in what amounts to appeals to prejudice on the part of the jury. The more flagrant instances of this may be treated under two heads. In the first place, it was wrongfully charged that the appellant had accused Mr. Holmes of fraud in connection with the sale of portions of his land some years before this action was filed. This charge was neither supported by the evidence nor material to any issue in the case. In spite of this, the charge was made again and again during the presentation of the evidence and in the argument, and was so repeated and enlarged upon as to be made to assume the aspect of a major issue in this case. The numerous references to this matter justify the inference that this was intentionally done. Having thus built up the idea that the appellant was in this case charging Mr. Holmes with fraud, the respondents repeatedly urged the jury to vindicate Mr. Holmes by means of its verdict. A few excerpts from this portion of the argument will suffice:

"I therefore say to you that the mere mention of it, as it is in the minds of every fair and just and thoughtful man and woman, is enough not only to refute the charge but to damn the fellow who makes the charge. And I say to you that when this great big $220,000,000 corporation finds it necessary to belittle the properties at Cajalco and to beat down the estimation of the market value of those properties by undertaking to assassinate, not by evidence, but by mental suggestions to poison your minds, the character of the man who owns that property, * * * I say that in the hearts of just men and women in Southern California, and wherever this action of that District in time to come may become known, that District will never live down the reputation that having tried in this case to assassinate the character of the man who owned the property in order that they might receive the property he was compelled to give without his consent—he didn't want to sell it—because they had a right to take it at a price far less than its market value, and far less, less than one-tenth of the price that actually has been received over the years for the sale of the land that lay in the same identical bowl known as Cajalco basin. * * * She has been here when some of the most brutal attacks, by innuendo and insinuations, against her husband have been made.

"* * * There was only once when she broke, and that was when the indignities, the insinuations, the innuendoes

which she had suffered about her husband's honesty were mentioned by Mr. Clark during his argument. Then when I heard the sobbing, the outburst of that anguished wife behind me, I turned around. The tears were rolling down her cheeks, but that faith which I hope to find, that faith which I do not now understand, came to her rescue, buoyed her up, lifted her, and she smiled, and she said, 'Go on. Go on.' * * *

"We say to you * * * that no verdict shall be returned by you from which the Metropolitan Water District or any of its legions of employees or attaches or anybody else will ever be able to lift a hand during the few short years of the lifetime of Lawrence Holmes or in the lifetime of any of their young children and say, from that verdict it is a necessary inference that Lawrence Holmes, the father of the children, was a liar and a thief when he sold these lands to these people who bought carob plantations in the great community of Cajalco."

The court emphasized the matter of fraud by giving the following instruction: "You are instructed that when a person is charged with fraud, the law presumes that he is innocent of the charge, and the burden of proving the fraud rests upon him who charges the fraud. This presumption is evidence in the case, and it approximates in strength the presumption that a person is innocent of crime."

Many times during their arguments counsel for respondents pictured the appellant to the jury as a great corporation which was using its wealth and power to impose upon the respondents. One counsel, after saying that the delay of three and one-half years in bringing the suit could not be justified "by anything known in the common estimation of mankind", said: "But I say the evidence in this record shows that one of the most atrocious things, in so far as the fixing of the value of these properties is concerned by you—you good men and women—that delay of three and one-half years was one of the most atrocious and insufferable things of which a condemnor could be guilty, and that does not exclude the Metropolitan Water District."

After commenting upon the depression and the dire needs of the people living in the Cajalco district he then said it was a necessary inference that the appellant had thus delayed filing its action "in order that they could beat those people down to the point where they could not hang on any longer and would sell off for just what the District would choose to give them. Then that being done to come into this court and for those who had the resources to hang on for a little while longer, the District then to file the suit and then say, look at what we bought."

Again and again counsel referred to the influence and power and terror that could be exerted by such a tremendous corporation as the appellant; to the unlimited resources, man-power and money of the appellant; that "when this great big $200,000,000 corporation finds it necessary to belittle the properties of the Cajalco"; that the jury was not concerned with the wishes of any such corporation or of any "prince or potentate"; that "this power is so tremendous, what little can we do against this power"; that during the three and one-half year period every one of these owners knew he would have to give up his land and "surrender it to a superior force"; that "You may have looked forward to the time when you would occupy your little home surrounded with evergreen trees, but you are in the way of this corporation. They file the action and they say 'we need your place and we are going to take it'"; and that for three and one-half years these defendants had lived with a "threat hanging over their heads like the sword of Damocles". One counsel said: "We know the unequal contest here" and then after four references to the $220,000,000 corporation, said: "On the one hand you have them, the corporation, the plaintiff in this case, and on the other hand you have a disorganized, weak defendant, fighting for their homes." Other counsel said:

"You know, there is something funny about being employed by a great big corporation. It is a peculiar psychological complex that has baffled the psychologists ever since the first big corporation was formed. I don't need to remind you other than briefly of the early days of the Standard Oil Company, and of all the atrocious things that were charged (most of which were proved) against it. It was one of the first of what have finally come to be known as the predatory corporations of America, whose abuses of capitalistic privileges and power mark one of the darkest chapters in the economic and financial history of America. And from that time on down

we have our steel company, and all the others. And you remember—What was it?—a billion dollar fine or something? But there is something very peculiar about the fact of being employed by a great big corporation. * * *

"Bear this in mind, friends, that as we listen to the end of the calling of that roll, the only sound we hear is the patter of those disappearing feet of the District; but bear in mind, when your verdict shall have been returned, finally shall have been written to the chapters in this case, you will find those footfalls coming back and in increasing crescendo the sound of those pattering steps falling on your ear, because, when it is all said and done, the King, the King, the Metropolitan Water District, that believes the King can do no wrong, will be found sitting on his throne in the empire that was Cajalco, the possessor and the user of all that we have."

[17] The respondents contend that the improper elements thus injected into the case and any misconduct during the argument were those normally to be expected in the heat of such a contest, that many of them were the result of sufficient provocation, and that no prejudice resulted since the amounts found by the jury were less than the highest amounts at which the respondents' witnesses valued the respective parcels. It is often difficult to tell whether verdicts have been affected by such improper matters. It is significant here, however, where a direct appeal was made to the jury to vindicate Mr. Holmes upon a supposed charge of fraud, that the amounts allotted to the parcels owned or controlled by him are substantially larger than those allowed others for similar lands. As to the awards in general, while the jury did not follow the values given by the respondents' engineer witnesses it allowed amounts almost double the values given by the respondents' nonengineer witnesses, and greatly in excess of the values given by the appellant's witnesses. How the jury arrived at the exact amounts fixed by the verdicts cannot be told but these repeated appeals to the emotions and prejudices of the jury are filled with such potential elements of danger that it is not possible to say, under the circumstances of this case, that the verdict was not affected thereby.

[18] The respondents argue that the appellant is not in a position to complain of the misconduct of counsel during argument, in the instances above referred to and many others, since the appellant did not, as each one occurred, request the court to instruct the jury to disregard the same. No such request was made, although objections were made in many instances. However, very early in the argument when an exception was taken to a statement of counsel attacking the appellant for running away from a certain matter, counsel for respondents stated: "May I say this, that I am perfectly willing, after the arguments are concluded, so far as I am concerned, they may note in the printed record any exception to it they desire." Counsel then proceeded and many of the matters in question are found in his later argument.

While the rule referred to is often applied, this usually occurs in cases where the misconduct is not aggravated either in nature or extent. That rule should not apply here where, in effect, the appellant was invited to refrain from interrupting the argument and to make its exceptions on appeal, and where the instances of improper argument were so numerous and so serious that such instructions, if requested and given, could not reasonably be expected to have cured the error. Moreover, under the circumstances here appearing, a duty rested upon the trial court which should have been exercised of its own motion. In our opinion, the amount and nature of the improper arguments which were here permitted to be addressed to the jury were such as to be potently prejudicial, and were, in themselves, sufficient to require a reversal. While the respondents are entitled to the full market value of their lands, the appellant is entitled to a fair trial on that issue.

[19] The only other point raised, which applies to all of the twenty parcels involved on this appeal, is that the jury should not have been instructed to add interest at seven per cent, from the date of taking possession of the lands to the date of entry of judgment, on the amounts found as the value of the respective parcels. For the reasons given in Metropolitan Water District of Southern California v. E. Bennett Adams, Cal. App., 99 P.2d 675, the opinion in which is this day filed, the allowance of such interest was error.

The judgments appealed from are reversed and the consolidated actions are remanded for a new trial.

We concur: GRIFFIN, J.; THOMSON, Justice pro tem.

## METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.*

Civ. 2434.

District Court of Appeal, Fourth District, California.

Feb. 21, 1940.

Hearing Granted April 18, 1940.

**1. Constitutional law ⇐24**

. The adoption of the constitutional amendment providing that a metropolitan water district may immediately, after suit is filed, take possession of land on depositing in court sums adequate to secure payment of just compensation for such taking and any damage incident thereto did not have the effect of reviving the statute allowing interest from date condemnor is let into possession, since the incidental damage is to be considered in fixing the just compensation for the taking of the land, to which the owner is entitled, and the idea that legal rate of interest should be the measure of damage was rejected. Code Civ.Proc. §§ 1249, 1254; Const. art. 1, § 14, as amended in 1934.

**2. Eminent domain ⇐130**

Under constitutional amendment providing that a metropolitan water district may immediately, after suit is filed, take possession of land on depositing in court sums adequate to secure payment of just compensation for such taking and any damage incident thereto, the loss of the use of land pending trial of the action is "incidental" to the taking of the land and the resulting damage is "incident thereto," and should be considered in fixing the just compensation for the taking of the land to which the owner is entitled. Const. art. 1, § 14, as amended in 1934.

**3. Eminent domain ⇐221**

Under constitutional amendment providing that a metropolitan water district may immediately, after suit is filed, take possession of land on depositing in court sums adequate to secure payment of just compensation for such taking and any damage incident thereto, question as to whether owner has been damaged by being deprived of the use of property, together with the amount of such damage, is a question of fact. Const. art. 1, § 14, as amended in 1934.

**4. Eminent domain ⇐222(5)**

In eminent domain action, instruction to add interest at 7 per cent. to the amounts found as the value of respective parcels from the date of taking possession of the land to the date of entry of judgment was erroneous. Code Civ.Proc. §§ 1249, 1254; Const. art. 1, § 14, as amended in 1934.

---

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action in eminent domain by the Metropolitan Water District of Southern California, a municipal corporation, against E. Bennett Adams and others. From those portions of the judgment which covered allowances for interest, plaintiff appeals.

Reversed as to those portions of judgment appealed from.

James H. Howard, Arthur A. Weber, Charles C. Cooper, Jr., and Donald M. Keith, all of Los Angeles, for appellant.

Miguel Estudillo and C. L. McFarland, both of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action in eminent domain for the purpose of condemning certain parcels of land for use as a part of what is known as the Cajalco reservoir in Riverside county. The action was brought on March 11, 1935. On August 21, 1935, an order was made, pursuant to article I, section 14, of the Constitution of this state, granting to the plaintiff the right of immediate possession and use of the lands upon the deposit in court of certain sums as security. The action was partly tried in 1936, but the issue as to the amounts of damage or the market values was tried before a jury in 1938. The verdict, findings and judgment all contained, in addition to the amounts found as the value of the respective parcels, further sums covering interest at seven per cent, with respect to each of these amounts, from the date of taking possession of the lands to the date of entry of judgment. The plaintiff has appealed from those portions of the judgment which covered these allowances for interest, and the legality of such allowances is the only question presented on this appeal.

The appellant relies upon the general rules that, unless specifically allowed by law, interest is not allowed prior to judgment on unliquidated claims and is not allowable on claims against a municipal corporation, and contends that in this state there are neither statutory nor constitutional provisions allowing interest under these

*For subsequent opinion see 107 P.2d 618.

circumstances. The respondents, on the other hand, contend that interest covering the period of time during which an owner is deprived of the possession and use of his lands is necessarily a part of the just compensation guaranteed by the Constitution, and further argue that the allowance of such interest is authorized by that part of section 1249 of the Code of Civil Procedure which reads: "If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order."

The part of section 1249 which we have just quoted was included in that section as enacted in 1872. At that time section 1254 of that code provided that the court might, at any time after the service of summons, authorize the plaintiff to take possession and use the property pending the final determination of the action, upon the giving of certain security. This provision, to which the quoted portion of section 1249 referred, was held unconstitutional. Vilhac v. Stockton & I. R. R. Co., 53 Cal. 208, and cases there cited. Thereafter, and for some forty years, there was no provision in this state, statutory or otherwise, permitting the taking of possession of land in such an action prior to the entry of judgment, to which the quoted portion of section 1249 could have been applied.

Section 1254 was amended several times, the last being in 1903. Stats. 1903, p. 109. Since that date it has provided that possession of the land involved might be taken after judgment and pending appeal upon an order of court and the giving of certain security. In 1911 (Stats. 1911, p. 842) section 1249 was amended by adding a provision to the effect that where the action was not tried within one year and the delay was not caused by the defendant the compensation and damages should be fixed as of the date of the trial. By a constitutional amendment adopted in 1918, provision was again made for the taking possession of land prior to judgment, in such an action as this, upon an order of court and the giving of certain security. This provision, as amended in 1934, is now section 14 of article I of the state Constitution. It provides that private property shall not be taken or damaged without just compensation and, among other things, provides that a metropolitan water district may, immediately after suit is filed, take possession of the land on depositing in court such sums as the court may deem adequate to secure the "payment of just compensation *for such taking and any damage incident thereto*". (Italics ours.) The real question here involved is whether or not the adoption of section 14 of article I of the Constitution has revived and made effective the interest provision of section 1249 of the Code of Civil Procedure which was ineffective for so many years, and whether the provision for interest contained in section 1249 is now to be taken as referring to and applying to the provision for immediate possession now contained in that section of the Constitution.

While this question has not been decided in this state, some light is furnished by the case of Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426, 428. In that case, the award was paid into court but the landowner appealed. Pending the appeal the condemnor secured an order for the possession of the property, as then and now provided for in section 1254 of the Code of Civil Procedure. After the judgment was affirmed the landowner sought an order for the payment to him of the amount of the award, plus interest from the date of the order for possession to the date of the filing of the remittitur. This being denied, he appealed. The court reviewed sections 1249 and 1254, with the various amendments thereto, and held that none of these amendments had revived the interest provision of section 1249 which had remained therein since its original adoption in 1872, and held that there was then no provision for the allowance of interest, as therein claimed, for the period between the order for possession of the land and the termination of the appeal. While the court recognized the justice of the original provision for interest contained in section 1249, since the measure of damage at that time was the value of the property at the commencement of the action and no provision was otherwise made for compensating the owner for the use of the property prior to the entry of judgment, it pointed out that this provision for interest had not been preserved or revived by the amendments to section 1249 and to section 1254. In this connection the court said: "Where a statute by adoption refers, not to a particular statute or provision thereof, but to the law generally which governs the particular subject, the reference is to be construed as applying, not only to the law as it existed at the time of enacting the

adopting statute, but to the law as changed from time to time, and as it exists when invoked in an action or proceeding. Gaston v. Lamkin, 115 Mo. 20, 21 S.W. 1100; Culver v. People, 161 Ill. 89, 43 N.E. 812. Not so, however, when, as here, it designates and adopts an entire provision contained in a section of the Code by reference to its descriptive number. In such case the statute so adopted by reference is the same as though the provision adopted had been bodily incorporated in the adopting statute. People v. Whipple, 47 Cal. 592; Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946. In the absence of express intent to the contrary, and none is apparent here, the reference made in section 1249 as originally enacted must be construed as referring to the provision contained in section 1254 as it existed at the time when section 1249 was passed; and it cannot be interpreted as adopting an entirely new provision designated as section 1254."

In referring to the amendment of section 1249 in 1911, by which the value of the land is in some cases to be fixed as of the date of the trial where more than a year had elapsed, the court said: "The intent of the Legislature was to enact the change as indicated without in any wise affecting the portions of the statute merely copied; hence by such copying no new, greater, or different force attached to the reference provision of section 1249 other than that to which it was entitled when originally enacted in 1872, which, upon being held in contravention of the Constitution, was repealed, and a new and entirely different scheme substituted therefor. For that reason there was nothing upon which the language used could operate, and the mere retention of the reference in amending section 1249 in 1911 cannot be construed as referring to and adopting the provision of section 1254, as now existing, between which and the provision contained therein when section 1249 was enacted there is not the slightest analogy."

[1-3] Under the reasoning of the case just referred to, the adoption of a newly-numbered code section, in 1918, providing for the taking of possession of such land under a court order prior to judgment, would not have made the interest provision of section 1249 applicable, since the reference therein is specifically to section 1254, as it originally existed, and not to a general law governing that subject. If the interest provision of section 1249 would not apply to a new statute containing somewhat similar but different provisions from those of the statute to which specific reference is made, it would seem even more logical to hold that that provision, after lying dormant for many years, does not apply to and is not to be taken in connection with a new constitutional provision which, while it contains matters somewhat similar to some of those in the statute originally referred to, also purports to set up a complete and different scheme for handling the same subject-matter. Section 14 of article I of the Constitution, which was in force at the time this action was tried, after providing for just compensation to the owner of the land, provides for the taking of possession at any time after suit is brought upon order of court and upon the depositing of money in the amount fixed by the court by way of security, not only for just compensation for such taking of the land but for "any damage incident thereto". The loss of the use of the land, pending trial of the action, is incidental to the taking of the land, and the resulting damage is one "incident thereto". Since it is thus provided that the money deposited is to also stand as security for any damage incident to the taking of the property before judgment, it must have been intended that such incidental damage should be considered in fixing the just compensation for the taking of the land, to which the owner is entitled. Since this element is to be considered in fixing the just compensation, it would seem to follow that it is to be considered by the jury, or trier of fact, and that the question as to whether the owner had been damaged by being deprived of the use of the property, together with the amount of any such damage, were questions to be decided as matters of fact at the trial of the action. This being so, it would further seem that the intent of the legislature, in submitting this constitutional amendment to a vote of the people and the intention of the people in adopting it, was to reject the idea of adopting the legal rate of interest as the measure of such damage and, in lieu thereof, to adopt and provide an entirely different way of measuring that damage.

It may be conceded that, in some cases, it would be just and right, where possession of land is taken before judgment, to allow as one element of the damage suffered interest on the amount awarded. This is not always true, however, under statutes permitting the fixing of the value of the land

as at the time of trial, instead of at the time summons is issued, because the value of the land may have increased in the meantime and to then allow interest would be to allow a double benefit for the same thing. The incidental damage resulting from the loss of the use of the land, pending the trial of the action, may be greater or less than the legal rate of interest, depending upon many circumstances. While the legislature or the people could have provided that interest at the legal rate should be taken as the measure of the damage arising from such an interim loss of use of the land, they have not done so. While in some cases an owner may be damaged by losing the use of the land during such a period, the extent of such damage cannot be presumed under existing statutes or constitutional provisions, and the amount of such damage, if any, is a question of fact to be decided in connection with the other issues and upon which proof is necessary.

[4] We conclude, therefore, that the court erred in instructing the jury to add interest at 7 per cent to the amounts found as the value of the respective parcels, and in making findings and entering judgment which included these items of interest.

Those portions of the judgment which are appealed from are reversed.

We concur: GRIFFIN, J.; THOMSON, Justice pro tem.




37 Cal.App.2d 360

## KONIG v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES.

Civ. 2509.

District Court of Appeal, Fourth District, California.

Feb. 17, 1940.

**1. Venue ⇐4**

An action for an accounting of receipts and disbursements and for payment of sums allegedly owing to plaintiff under contract in connection with operation of an almond orchard, wherein sole defendant was a California corporation, was a "personal action" or "transitory action," and hence the statute requiring that all actions be tried in county in which some of the defendants reside did not apply, and resort would be had to constitutional venue provision. Code Civ. Proc. § 395; Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Action" and "Transitory Action."

**2. Corporations ⇐503(3)**

In transitory action wherein sole defendant is a California corporation, burden is on corporation to show that place of filing of action is not the proper county for trial which may not be done by showing of residence alone, since under the Constitution a corporation which is sole defendant in a transitory action does not have an absolute right to have action either commenced or removed to county where its principal place of business is situated. Const. art. 12, § 16.

**3. Corporations ⇐503(1)**

The constitutional provision governing venue of an action against a corporation on contract is permissive and in absence of a motion for a change of venue such an action may under the statute relating to the transfer of actions for lack of jurisdiction be brought in any county in the state. Code Civ.Proc. § 396; Const. art. 12, § 16.

**4. Corporations ⇐507(3)**

In transitory action wherein sole defendant was a California corporation, the venue, as laid in the title of the action, made out a prima facie case, and corporation's motion for a change of venue to county of corporation's residence having been made on the sole ground of residence, was properly denied. Code Civ.Proc. § 395; Const. art. 12, § 16.

**5. Corporations ⇐503(2)**

Under provision of Constitution permitting suit on contract against a corporation in county of performance, corporation's agreement to manage almond orchard and to pay any taxes on such property was to be "performed" within meaning of Constitution, in county where land was situated and action for breach of agreement could be maintained there. Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Perform."

**6. Corporations ⇐503(1)**

An action against a corporation for an accounting of receipts and disbursements under a contract for the operation of an almond orchard was maintainable in the county where plaintiff resided, since the breach of the contract occurred therein within the meaning of the constitutional provision permitting action to be brought in the county where the breach occurred, as against a contention that no breach was involved because of the accounting feature of the action where the accounting feature was but an incident of the transaction. Const. art. 12, § 16.

**7. Appeal and error ⇐912**

On appeal from denial of defendant's motion for a change of venue, reviewing court must assume truth of allegations of complaint.

**8. Payment ⇐6**

In absence of an agreement or stipulation to the contrary, a debt is payable at place where creditor resides or wherever else he may be found.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Jacob Konig against the Associated Almond Growers of Paso Robles (a corporation), for an accounting and for the payment of moneys allegedly owing to plaintiff in connection with operation of an almond orchard. From an order denying defendant's motion for a change of venue, defendant appeals.

Affirmed.

T. H. Canfield, of Santa Barbara, for appellant.

H. J. Dubin and C. P. Kaetzel, both of San Luis Obispo, for respondent.

THOMPSON, Justice pro tem.

This is an appeal from an order of the superior court of San Luis Obispo county denying a motion for a change of venue to the superior court of Santa Barbara county.

The plaintiff and respondent brought an action in the superior court of San Luis Obispo county for an accounting of receipts and disbursements and for the payment of sums owing to plaintiff in connection with the operation of a certain almond orchard in San Luis Obispo county. The complaint alleges that defendant is a California corporation; that plaintiff purchased from defendant a certain almond orchard in San Luis Obispo county; that by agreement of the parties defendant remained in possession of the almond orchard for a number of years and operated it for plaintiff's account, with the understanding that, "from the proceeds of such operation by defendant, it would deduct the annual costs thereof, pay the taxes upon said land and credit the overplus to plaintiff"; that the receipts exceeded the expenses and taxes; and also that plaintiff advanced in excess of $2,000 to defendant to cover alleged deficits which defendant, from time to time, represented to plaintiff existed by reason of said operations; that plaintiff demanded from defendant an accounting and the payment of the sums disclosed by such accounting to be due to plaintiff; and that defendant has refused to render such accounting or pay such sums. Plaintiff prays for an accounting and payment of all sums proved to be due.

On the motion for a change of venue defendant proved that its principal place of business was in Santa Barbara county by affidavit, and also by a certificate of change of its principal place of business from San Luis Obispo county to Santa Barbara county, showing that such removal was effected about two and one-half years after the making of the contract between plaintiff and defendant. No counteraffidavits were filed and no other proof offered. Defendant's notice of motion for change of venue specified that the motion would be made upon the sole ground of the residence of defendant. The only evidence presented by defendant in support of this motion related solely to the question of defendant's residence.

[1] This is a personal or transitory action wherein the sole defendant is a California corporation, therefore, section 395 of the Code of Civil Procedure does not apply and resort must be had to the provision of the Constitution which governs the venue in such actions. Cook v. W. S. Ray Mfg. Co., 159 Cal. 694, 696, 115 P. 318. Article XII, section 16, of the Constitution of California provides that "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the

court to change the place of trial as in other cases."

Appellant contends that plaintiff's complaint herein does not allege in any manner, directly or indirectly, by inference or otherwise, that any contract was made, or was to be performed, or that any obligation or liability arose against defendant, or any breach occurred, in the county of San Luis Obispo. If we assume for the present that this contention is correct, was plaintiff required to make any such allegations in his complaint or to offer any proof of such facts on the motion, in order to avoid a change of venue under the facts of this case?

The position of appellant is that, on a motion for a change of venue made by a California corporation which is sole defendant, when defendant, in support of its motion, has shown that its principal place of business is in another county, the burden is upon plaintiff, in order to defeat the motion, to show that the contract was made, or was to be performed, or that the obligation or liability arose, or the breach occurred, in the county where the action was brought. In support of this contention defendant relies upon California Bean Growers Corp. v. C. H. & O. B. Fuller Co., 78 Cal.App. 522, 248 P. 967; Ward v. Great Western Power Co., 135 Cal.App. 687, 27 P.2d 937; Hammond v. Ocean Shore Development Co., 22 Cal.App. 167, 133 P. 978; and Krogh v. Pacific Gateway Co., 11 Cal.App. 237, 104 P. 698. In each of these cases the opinion contains a statement to the effect that, where the corporation defendant has shown that the principal place of business is not in the county wherein the action is pending, the burden of proof is upon plaintiff to defeat the motion, but in none of said cases was such statement essential to the decision, nor was it necessary to determine the question of burden of proof. In the case of Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 342, 21 P.2d 443, this court points out that such statements in the last two of said cases relied upon by appellant were dicta and lays down the principle that the burden is not upon the plaintiff, but is upon the corporation defendant to show that the place of filing such an action as this is not the proper county for trial. So far as it relates to such burden of proof, said case of Rowe v. Policy Holders Life Ins. Ass'n, supra, is cited with approval in Union Oil Co. v. Basalt Rock Co., Inc., 30 Cal.App. 2d 317, 319, 86 P.2d 139.

[2-4] That the burden of proof is upon defendant in such cases is, no doubt, the reasonable view, because a corporation which is the sole defendant in a transitory action, unlike a natural person who is a defendant in such an action, does not have an absolute right to have the action either commenced or removed to the county where its principal place of business is situated, that being its legal residence (Gallup v. Sacramento, etc., Drainage Dist., 171 Cal. 71, 74, 151 P. 1142), merely upon the ground that its residence is in a different county from the one in which the action is brought. Under the constitutional provision plaintiff had the right to elect to sue the corporation defendant in the county where the contract sued upon was made, or was to be performed, or in which the obligation or liability arose, or the breach occurred, and it follows that, having the right to sue the corporation in such county, plaintiff also has the right to have the action tried or prosecuted to a finality in such county, unless the place of trial is changed for some sufficient reason other than that of residence of the corporation defendant. Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 302, 195 P. 284. A similar case to the one at bar is the case of Chase v. South Pacific Coast Railroad Co., 83 Cal. 468, at page 472, 23 P. 532, at page 533, wherein the court said: "The only venue laid in the complaint is in the title thereof; there is nothing in the body of it to show within what county the defendant refused to perform its duty as a common carrier toward plaintiffs; but, as the court has jurisdiction of the subject-matter of this action * * * and as an action upon the breach of such an obligation may be brought in the county where the breach occurred as well as in the county where the defendant has its principal place of business, * * * the action was presumptively brought in the proper county, and it devolved upon the defendant to show, upon its motion, that the breach of its obligation as a common carrier declared upon by plaintiffs did not occur in Santa Cruz county. Having failed to do this, the motion was properly denied; * * *." Article XII, section 16 of the Constitution has been held to be permissive and does not prevent a plaintiff suing a corporation in any other county in

the state (Hobson v. Metropolitan Cas. Ins. Co., 114 Cal.App. 349, 353, 300 P. 87), and under section 396 of the Code of Civil Procedure, in the absence of a motion for a change of venue, the case could be tried there. It follows, therefore, that, even if we assume that in the instant case the only venue laid in the complaint is in the title thereof, "the burden is not on the plaintiff to show that such an action was brought in the proper county or that he comes within an exception to any general rule, but the burden is on a corporation defendant to show that the place of filing such an action as this is not the proper county for trial, which may not be done by a showing of residence alone". Rowe v. Policy Holders Life Ins. Ass'n, supra, 131 Cal.App. page 344, 21 P.2d page 445; Union Oil Co. v. Basalt Rock Co., Inc., supra. Applying this rule to the present case, the venue, as laid in the title of the action, made out a prima facie case, and the defendant's motion having been made on the sole ground of residence, the trial court properly denied the motion.

[5-9] In the instant case it is not necessary to resort to the rule above stated, for a reading of the allegations of the complaint discloses that the contract which forms the basis upon which this suit is predicated was to be performed in San Luis Obispo county, within the meaning of article XII, section 16 of the Constitution. The complaint alleges that the land, which was the subject of the agreement, is situated in that county. The operations of defendant in caring for and harvesting the crops on said lands under the agreement were necessarily to be carried on in San Luis Obispo county, where the land was situated. The taxes were to be paid in that county. In Rawson v. J. C. Forkner Fig Gardens, Inc., 206 Cal. 4, 6, 272 P. 1057, the plaintiff sued for money alleged to be owing to him by the corporation defendant as commissions for the sale of real property situated in Fresno county. The court said that the contract related to services to be performed in Fresno county and held that it was, by its terms, to be performed there. In this connection appellant asserts that this case, being a suit for an accounting, is not a contract action and, therefore, it would be immaterial where the contract was made or where the breach occurred and that any obligation to account must arise in the county of defendant's residence. However, the necessity for an accounting, and defendant's obligation to account to plaintiff and pay any sum found to be owing, arose out of the agreement between the parties, and it seems apparent from the complaint that the obligation or liability of defendant arose in San Luis Obispo county when, in the course of defendant's operations on plaintiff's land in said county, under the agreement, defendant harvested and took into its possession sufficient crops to defray the operating expenses, and pay the taxes, and make a profit, and retained for its own use all or part of the proceeds of said crops. The accounting is but an incident of the transaction and the place of performance of the agreement becomes important in determining the venue under the facts of this case. Moreover, the complaint alleges that, during the operations of defendant under the agreement, plaintiff was absent from the state and had no knowledge of the true receipts and expenses of said operations, but that plaintiff took up his residence in this state and took possession of said land in August, 1936, and, having learned that profits had been received by defendant, plaintiff demanded that defendant pay him the amount due to him from defendant, which he alleges is in excess of $2,000. Assuming the truth of these allegations, as we must for the purpose of this appeal, it was the duty of defendant, as a part of its performance of the agreement, to pay to plaintiff the amount due under said agreement when plaintiff demanded such payment. In the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides or wherever else he may be found. 24 Cal.Jur. 521. Plaintiff could then be found in San Luis Obispo county, as the complaint shows, and defendant failed to pay the debt and thus discharge its obligation to plaintiff. This constituted a breach of defendant's promise to pay plaintiff such excess profits, and the debt being then payable in San Luis Obispo county, the breach occurred in that county within the meaning of the constitutional provision above mentioned.

We conclude that the burden was upon defendant to show grounds for removal of the place of trial other than the fact that its principal place of business was in another county, and, having failed to meet this burden, the motion was properly denied; and that an additional reason appears in

this case to justify the order denying the motion in that the complaint shows directly, or by inference, that the contract was to be performed, and the obligation or liability arose, in the county in which the suit was filed.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 455

## GUTELIUS v. GENERAL ELECTRIC CO.

Civ. 12426.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1940.

Rehearing Denied March 18, 1940.

Hearing Denied April 25, 1940.

**1. Negligence ⇐66(1)**

The rule that manufacturer of article reasonably certain to place life and limb in peril when negligently made is liable for damages to persons injured while using article in manner intended, because of negligence in making it, is subject to qualification that user must be without knowledge of defective condition of article.

**2. Negligence ⇐135**

In woman's action to recover damages for injuries suffered when her hair became entangled in roller of washing machine wringer manufactured by defendant, plaintiff's testimony *held* to show that she was fully informed of defective condition of shifter lever, which failed to function properly at time of accident, so that her continued operation of machine with such knowledge precluded recovery.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Ethel Gutelius against the General Electric Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Meserve, Mumper & Hughes, of Los Angeles, for appellant.

Samuel A. Rosenthal, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff recovered a judgment for damages for injuries which she suffered when her hair became entangled in a roller of a washing machine wringer which had been manufactured by defendant. The appeal is taken by defendant from the judgment, which was rendered by the court sitting without a jury.

Plaintiff bases her claim for damages upon her allegation of negligence in the manufacture of the washing machine in that the gear shift mechanism, by which the revolution of the rollers of the wringer was controlled, was defective. The trial court found that plaintiff "while using the said washing machine, caught the end of her long hair around the lower roller of the said machine and attempted to turn the shifter lever into its neutral position in order to stop the said rollers and release her hair; that it is true that as a result of the negligent, careless and unlawful manner in which the defendant, through its agents, servants and employees, had manufactured the said washing machine and the clutch and shifter lever of which it was a part, that the said shifter lever was caused to stick, causing the lower lever to continue revolving, as a result of which the plaintiff's hair became entangled around the said lower roller, whereby and because whereof the plaintiff Ethel Gutelius sustained personal injuries." Defendant attacks this finding as being defective in that there is no finding on the issue of the proximate cause of plaintiff's injuries.

The washing machine involved in the accident was purchased by plaintiff on August 6, 1937, and was used by plaintiff not less than two or three times weekly during the ensuing period until the date of the accident, September 20, 1937. During this period plaintiff had difficulty in using the machine and about ten days prior to the accident the dealer who had sold the machine, Mr. Stine, called at plaintiff's request for the purpose of ascertaining the cause of the peculiar noise which the machine was making. At this time plaintiff advised Mr. Stine that the shifter lever was inclined to stick and that it operated with considerable difficulty. Plaintiff testified that

Mr. Stine used a screwdriver to loosen and tighten a screw in the shifter lever. Plaintiff further testified that after the visit from Mr. Stine the shifter lever continued to stick and function with difficulty; that thereafter and on an occasion about a week before the accident she attempted to operate the shifter lever but it stuck and could not be moved, and on this occasion it became necessary for her to pull the plug from the wall in order to disconnect the electric power and thus stop the wringer. After this occurrence plaintiff made no inquiry of the dealer or anyone else to ascertain the cause of the difficulty. Notwithstanding these experiences plaintiff continued to use the machine and wringer until the date of the accident.

At the time of the accident plaintiff was wearing her hair shoulder length and it was loosely combed. She testified: "Q. As you reached down into the tub, the bulk of your hair was down over your head, and down in the tub, with your hair hanging—— A. Yes, sir. It had to go with my head." Plaintiff further testified that when she discovered that her hair was caught she struck the emergency release with her hand, thinking that the emergency release would stop both rollers and set her hair free. The emergency release functioned properly and the upper roller was immediately released and disengaged, but the lower roller continued to revolve and plaintiff's hair was wound around it. Plaintiff then attempted to stop the wringer by operating the shifter lever but the shifter lever was stuck and would not move. Her head was being drawn against the roller and in order to stop the machine she jerked the plug from the socket and disconnected the power. By this time her scalp had been painfully injured.

After the accident plaintiff summoned a mechanic who examined the machine and filed from the clutch a "burr", approximately the size of the rubber on an ordinary lead pencil, which, according to the mechanic's testimony, was the cause of the refusal of the shifter lever to function properly.

[1] Plaintiff relies upon the rule that the manufacturer of an article which is reasonably certain to place life and limb in peril when negligently made, must be held liable for damages caused to persons using the negligently made article in the manner in which it was intended to be used. Such was the rule followed in the leading case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440. In Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, 482, a case in which a defective rung on an extension ladder collapsed, injuring a workman, the MacPherson case was referred to with the "full sympathy" of the court. It was held that there was a "question of fact for the jury as to whether or not an extension ladder of recent manufacture, when used as plaintiff was using it, became, because of defective construction or assembling, an instrument imminently dangerous to human life or limb". But the rule holding the manufacturer liable for negligence in construction is subject to the qualification that the user of the manufactured article must be without knowledge of its defective condition. In Bohlen's Studies in the Law of Torts at page 116, the author says: "It seems quite clearly established that where the purchaser, actually knowing the defective nature of the article, puts it to a use for which it is unfit and unsafe, any injury received therefrom is due to his misuse and not to the act of him who created the defect." The qualification of the general rule was recognized in Stultz v. Benson Lumber Co., 6 Cal.2d 688, 689, 694, 59 P.2d 100, 103, where Mr. Justice Shenk, speaking for the court, said: "Furthermore the pertinent principles hereinbefore referred to are predicated on the knowledge or duty of awareness of the defect on the part of the manufacturer or seller and his failure to warn the purchaser of such defect, and the absence of similar knowledge or duty on the part of the purchaser. 45 Cor.Jur., p. 892, § 331, and cases cited."

[2] In the case under review it is not contended that defendant had any knowledge or actual notice of the existence of any defect in the washing machine. On the other hand, it is manifest from plaintiff's own testimony that she knew from her own experiences that the shifter lever operated only with difficulty. A few days prior to the accident she had had an experience with the wringer similar to the one which caused her injuries on September 20, at which time the shifter lever did not function and she was obliged to pull the plug from the socket in order to turn off the electric power. She testified: "A. When I would be putting the clothes through the wringer, sometimes, I would have to stop, and I could hardly turn what

you would call the shifter lever." The only part of the machine claimed to have failed to function properly at the time plaintiff was injured was the shifter lever. The conclusion is irresistible that she was fully informed of this condition. It follows that she, having continued to operate the machine with such knowledge, is not in position to recover from the manufacturer.

The conclusion at which we have arrived as hereinabove set forth makes it unnecessary to consider the contention of defendant, that "a wringer with a gear shift that may refuse to operate" is not an instrumentality coming within the rule above discussed.

The judgment is reversed.

We concur: MOORE, P. J.; McCOMB, J.




37 Cal.App.2d 481

## MARTIN et al. v. BOARD OF TRUSTEES OF LELAND STANFORD JR. UNIVERSITY.

Civ. 11181.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1940.

Hearing Denied April 25, 1940.

**1. Judgment ⇐239**

Where trial judge, on May 14, 1938, granted defendant's motion for judgment notwithstanding verdicts for plaintiffs and denied a similar motion by codefendant, and on October 1, clerk entered judgment for plaintiffs pursuant to verdicts against codefendant and on November 21, clerk entered judgment for defendant, an order purporting to strike from files the judgments entered October 1 and November 21 could not be sustained on ground that two separate judgments were entered in the action. Code Civ.Proc. § 629.

**2. Judgment ⇐219**

Generally, reasons for a judgment are not part of the judgment.

**3. Judgment ⇐740**

A judgment properly drawn is "res judicata" as to issues determined, but it is not as to the reasons on which the judgment may be based.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata."

**4. Judgment ⇐527**

Where one claims that a judgment, as rendered, was limited, he should show that the judgment was limited by words therein, as "dismissed without prejudice," or "without prejudice to an action at law," but he cannot predicate contention of limitation on reasons expressed in opinion rendered by trial court, oral or written, nor by findings and conclusions, unless they were carried into judgment.

**5. Judgment ⇐219**

Where a trial judge, at the termination of a hearing, reviews the facts and law and states his conclusions orally or in writing with respect to a motion, the words "For the reasons stated in this summary," if not expressly used in disposing of motion, are implied.

**6. Judgment ⇐278**

Where trial judge, on May 14, 1938, granted defendant's motion for judgment notwithstanding verdicts for plaintiffs, and denied a similar motion by codefendant, and minute order contained no order that judgment be so drawn as to state reasons on which it was based, and on October 1, clerk entered judgment for plaintiffs pursuant to verdicts against codefendant and on November 21, clerk entered judgment for defendant, a subsequent order purporting to strike from files, judgments entered October 1 and November 21, could not be sustained on ground that record should be corrected to state truth and make clerk's entry of judgment conform to judgment rendered, since there was no error in record to be corrected. Code Civ.Proc. § 629.

**7. Appeal and error ⇐437**

Where defendant appealed from order purporting to strike judgments from files, the order was thereby stayed, and hence judgments would remain in effect unless order was affirmed. Code Civ.Proc. § 949.

---

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Lyn Martin, by her guardian ad litem, William Martin, and another, against the Board of Trustees of the Leland Stanford Junior University and another, for damages allegedly caused by personal injuries received by the minor plaintiff while a patient at a hospital. From an order purporting to strike from the files a judgment for the Board of Trustees after the Board's motion for judgment notwithstanding verdicts for plaintiffs was granted, the Board appeals.

Order reversed.

Hearing denied; CARTER, J., dissenting.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Frederick W. Kant and Lionel B. Browne, both of San Francisco, for respondents.

STURTEVANT, Justice.

The appeal is by the defendant, the Board of Trustees of the Leland Stanford Junior University, a corporation, from an order made after judgment, dated May 8, 1939, and entitled, "Order to strike purported judgment from files, to strike from files notice of entry of judgment filed November 21, 1938, and to enter judgment in conformity with court's minute order". And the appeal is presented on a printed transcript containing a bill of exceptions.

Plaintiffs in the action were Lyn Martin, a minor, and her father, William Martin. On behalf of the daughter, the complaint sought compensatory damages in the sum of $25,000 for personal injuries received while she was a patient at a hospital conducted by this appellant in San Francisco. On behalf of the father, the complaint sought consequential damages in the sum of $1,451.86 for medical, nursing, and hospital expenses for the minor daughter. Negligence was ascribed to the acts of two doctors (defendant Frederick Dovey Fellows and defendant John Adolph Bacher) as employees at the hospital.

A jury trial was had in August, 1935, before Judge Walter Perry Johnson. During the course of the trial a motion for a directed verdict was made by this appellant and denied. A similar motion was made by Dr. Fellows and denied. On August 28, 1935, two verdicts were returned by the jury—one for the daughter in the sum of $5,000 against Dr. Fellows and this appellant—and the other for the father in the sum of $1,250 against the same defendants.

Prior to the entry of judgment this appellant moved for judgment notwithstanding the verdict under section 629 of the Code of Civil Procedure. A similar motion was made by Dr. Fellows. Judge Johnson decided these motions on May 14, 1938. He then granted the motion of this appellant but denied the motion of Dr. Fellows. At the same time, he filed an opinion stating his conclusions and the reasons therefor. The minute order was as follows:

"In this action it is by the Court ordered, that, for the reasons stated in the opinion filed herein on this day, the motion of defendant, the Board of Trustees of the Leland Stanford Jr. University, for judgment in its favor notwithstanding the verdicts be, and the same is hereby granted and that the motion of defendant Frederick Dovey Fellows for judgment in his favor notwithstanding the verdicts be, and the same is hereby denied without prejudice to any further proceedings available to him and that judgment, pursuant to the verdicts heretofore rendered herein, be entered against said last named defendant."

No judgment was entered in the action until October 1, 1938, when the clerk entered judgment pursuant to the verdicts in favor of plaintiffs and against Dr. Fellows. It is identified in the record as the judgment entered in volume 444 of Judgments at page 417. On November 21, 1938, the clerk entered judgment in favor of this appellant and against the plaintiffs. It is identified in the record as the judgment entered in volume 448 of Judgments at page 151. Notice of entry of this latter judgment was given to plaintiffs and filed on November 21, 1938.

In April, 1939, the plaintiffs gave notice of a motion to strike the purported judgment from the files, to strike from the files the notice of entry of judgment, filed November 21, 1938, and to enter a judgment in conformity with the court's minute order. The motion was noticed on the following grounds: The record did not contain a final judgment conforming to the minute order of May 14, 1938; the record contained two separate judgments; the law demanded and contemplated but one final judgment in the action; the judgment of November 21, 1938, did not indicate the grounds upon which judgment notwith-

standing the verdict was ordered; the record should be corrected to state the truth and make the clerk's entry of judgment conform to the judgment actually rendered.

No affidavit accompanied the notice of motion; it was noticed upon the files and records in the action.

Judge Fitzpatrick granted the motion on May 8, 1939. The order decreed: "Now, therefore, it is hereby ordered, adjudged and decreed that the judgments entered in the above-entitled cause, respectively in Volume 444 of Judgments, Page 417, under date of October 1, 1938, and in Judgment Book Volume 448, at Page 151, under date of November 21, 1938, and the Notice of Entry of Judgment filed November 21, 1938, be stricken from the records, and that judgment be entered by the Clerk in conformity with the Minute Order of the above-entitled Court, made and entered on the 14th day of May, 1938, which said Minute Order reads as follows [quoting it]."

The present appeal is prosecuted from the foregoing order. The notice of appeal was duly filed on May 12, 1939.

[1] The defendant contends that the order made May 8, 1939 cannot be sustained on the ground that two separate judgments were entered in the action. That contention is clearly sustained by the ruling stated in Cole v. Roebling Construction Co., 156 Cal. 443, 448, 449, 105 P. 255; Frazzini v. Cable, 114 Cal.App. 444, 453, 454, 300 P. 121; Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365. The plaintiffs cite and rely on I Freeman on Judgments (4th Ed.) 38. The defendant does not question the rule stated in the passage so quoted but calls to our attention that said passage is not applicable in the present case. The distinction is well founded. Said section deals solely with interlocutory judgments.

[2-4] In its next point the defendant asserts that the order cannot be sustained on the ground the clerk's entry of the judgment did not conform to the judgment actually rendered. It calls attention to the fact that the order dated May 14, 1938 was a ruling on a motion for judgment notwithstanding the verdict; that it presented solely a question of law; that no findings were necessary; and that the statements of reasons for the ruling were no part of the judgment. Continuing it asserts the clerk entered a full and complete judgment reciting the judgment ordered and that the reasons therefor are no part of a judgment. That is the general rule. I Freeman on Judgments (5th Ed.), p. 5; 15 R.C.L. 570 and 596; 33 C.J. 1104. It has been followed in this state from an early date. Burke v. Table Mountain Water Co. & Laforge, 12 Cal. 403, 408. That case is particularly helpful as it also shows the reason for the rule. A judgment properly drawn is res judicata as to the issues determined, but it is not as to the reasons on which it may be based. If one would claim that the judgment as rendered was limited he should show, by words therein, such as "dismissed without prejudice", "without prejudice to an action at law", etc.; but he may not predicate the contention of limitation on reasons expressed in the opinion rendered by the trial court, oral or written (Martin v. Evans, 85 Md. 8, 36 A. 258, 36 L.R.A. 218, 60 Am.St.Rep. 292; Magarian v. Moser, 5 Cal.App.2d 208, 210, 42 P.2d 385); nor by the findings and conclusions unless they were carried into the judgment. Neilsen v. Neilsen, 216 Cal. 150, 152, 13 P.2d 715.

The plaintiffs reply to the last point by asserting a court has the power to correct its records to make them speak the truth. But they do not show wherein the judgments entered in 1938 did not speak the truth. The denial of the motion made by Dr. Fellows was in strict compliance with the order made May 14, 1938. The notice of entry of judgment dated November 21, 1938 was regular in every respect. The judgment in favor of this defendant entered in volume 444 of Judgments at page 417, was also regular in all respects except it did not enumerate the reasons stated in the opinion ordering the judgment. But, as we have shown above, said reasons constituted no part of the judgment.

[5, 6] Furthermore, the clear wording of the minute order dated May 14, 1938, contained no order that the judgment should be so drawn as to state the reasons on which it was based. In ordinary practice, at the termination of a hearing, frequently the judge presiding reviews the facts and the law and states his conclusions orally or in writing. In doing so the trial court sometimes uses language in effect: "*For the reasons stated in this summary* the motion is granted or the motion is denied", as the case may be. The language in italics is sometimes expressly used but, if not, it is implied. That was the purport

of the order made May 14, 1938. It contained no words showing that an order was to be made different from the orders made in the ordinary and usual practice. It follows there was no error in the record to be corrected and therefore no basis for making the order appealed from.

[7] The plaintiffs recite the fact that the trial court on May 8, 1939, made an order striking the judgments from the files. They then argue that such order is not appealable as an order made after final judgment because the judgments had been stricken out. If the order were operative, the contention might have substance. But the defendant appealed from that order and it was thereby stayed. Code Civ.Proc., sec. 949. It follows that the judgments are in effect and will so remain unless said order is affirmed. Galvin v. Palmer, 134 Cal. 426, 66 P. 572, contains nothing in conflict with what we have said.

The order appealed from is reversed.

I concur: SPENCE J.




37 Cal.App.2d 450

**In re MICKELSON'S ESTATE.**

**MICKELSON et al. v. MICKELSON et al.**

**Civ. 12502.**

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1940.

Rehearing Denied March 8, 1940.

**1. Wills ⇐384**

On appeal in will contest proceedings from a judgment of nonsuit, every favorable inference fairly deducible from the evidence and every favorable presumption fairly arising therefrom were taken as facts proved in favor of contestants.

**2. Wills ⇐324(4)**

If there is substantial evidence tending to establish the facts which contestants must prove in order to revoke probate of a will, issue should be submitted to the jury.

**3. Wills ⇐52(1)**

Where will is contested on ground that testator was of unsound mind, contestants must prove either such a complete mental degeneration as denotes an utter capacity to know and understand those things which the law prescribes as essential to the making of a valid will or the existence of a specific insane delusion which affected the making of the will.

**4. Wills ⇐324(2)**

Whether testator was suffering from insane delusion that he was not father of contestants, which was without any basis in fact, when he made the will was for the jury in proceeding to set aside probate of will on ground that testator was of unsound mind when will was executed.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Proceedings in the matter of the estate of Olaf Mickelson, deceased, by Fred M. Mickelson and another, contestants, against Nancy Adeline Mickelson, administratrix with the will annexed of the estate of Olaf Mickelson, deceased, and another, to set aside probate of a will. From a judgment on a demurrer and judgment of nonsuit, contestants appeal.

Judgment of nonsuit reversed; judgment on demurrer affirmed.

John F. McCarthy, of Long Beach, for appellants.

Russell D. Garner, of Los Angeles (Robert Kingsley, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Olaf Mickelson died on May 10, 1938, at the age of 76 years. His will, dated April 16, 1938, was admitted to probate and thereafter and within the time allowed by law contestants, sons of decedent, filed a petition for the revocation of the probate of the will. Upon the close of contestants' testimony presented at a jury trial the court granted a motion for a nonsuit and the appeal was taken from the ensuing judgment. The only point argued by contestants on this appeal concerns the ruling of the court in holding that it was not shown that decedent was of unsound mind at the time of the execution of the will. Although it appears from the record that an appeal was taken from the ruling of the

trial court sustaining a demurrer to causes of action setting up other grounds of contest, contestants have apparently abandoned their contentions in this regard and we therefore will consider only the issue concerning the mental condition of the decedent.

Decedent was married to his first wife, Matilda, in 1879 and lived with her until her death in July, 1936. Four children were born to them but only two, the sons Walter and Fred, contestants herein, were living at the time of his death. Seven months after the death of his first wife decedent married Nancy Adeline Mickelson, whom he met for the first time shortly after the death of his first wife. In the first three paragraphs of the will, which was executed during his last illness, decedent recites that he was married to Nancy Adeline Mickelson and that his two sons are his only surviving lineal issue. In the next paragraph of the will testator recites merely that he is the owner of certain described real property, but does not there make a gift of any of it. In the next paragraph he provides: "I hereby give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind or character, and wherever situated to my wife, Nancy Adeline Mickelson." Nowhere in the will does the testator state expressly to whom he gives the property described in the will.

From the evidence presented by contestants it appears that decedent was a mason and that during his first marriage he accumulated considerable property, residential property in Long Beach and an orange grove at Covina. He lived a healthy normal life and was mentally alert until February, 1935, when he suffered a "stroke". At that time he fell from a stool and was picked up unconscious. From then on his health failed and in the summer of 1935 he suffered another "stroke". From that time until his death he became progressively worse both mentally and physically. He appeared to realize he was failing mentally, for he declared that he was losing his mind and that something was going around and around in his head. His speech at times was unintelligible and his eyes had a blank stare. He became cruel and abused his first wife, who was a cripple, for some time before her death. His condition was such that at times he did not know what was going on around him.

Before he suffered the "strokes" decedent was on the best of terms with his two sons and for many months at a time lived in Walter's home. The other son, Fred, took complete charge of decedent's orange grove for three years without compensation. Shortly before his death decedent turned against his sons to such an extent that he left orders with the funeral director that they should not be allowed at his funeral. He had never questioned the faithfulness of his first wife during her lifetime but after her death he frequently questioned the paternity of his sons in conversations with Walter's wife and said that his first wife had had immoral relations with sixteen different men. To Walter he said: "Your mother was nothing but a street whore that I protected for 57 years." Contestants presented evidence that Matilda Mickelson had been a dutiful wife.

[1, 2] We must consider the evidence in the light of the rule that every favorable inference fairly deducible from the evidence and every favorable presumption fairly arising therefrom must be taken as facts proved in favor of contestants. The court must take the view most favorable to contestants if several different inferences may reasonably be drawn from the evidence. If there is substantial evidence tending to establish the facts which contestants must prove in order to make out their case they are entitled to have the issue submitted to the jury. Estate of Arnold, 147 Cal. 583, 82 P. 252.

In many decisions the reviewing courts of California have admitted wills to probate which were made by testators during their last illnesses even though the testators were admittedly of feeble minds or suffering from delusions or hallucinations. Mere proof of mental derangement or insanity has been held insufficient to invalidate a will. Estate of Russell, 189 Cal. 759, 769, 210 P. 249. In Estate of Perkins, 195 Cal. 699, 235 P. 45, 48, the decedent made a will during her last illness at the age of 56 years. A few days before the time of the signing of the will she told the nurse who was in attendance that she was going to be married and asked her to see that no one used the telephone as she wished to call up her bridesmaids. On another occasion within a few days of the time of the signing of the will she told the nurse that the pictures had been taken down from the hooks on the wall in order that babies might be hung there. The jury found that

the decedent was of unsound mind, but the Supreme Court in reversing the judgment refusing the probate of the will held that "no possible relationship between these delirious hallucinations and the testatrix's disposition of her property can be traced".

[3] It is not for this court to approve or disapprove the decisions of the Supreme Court, but rather we must be guided by them. The contestants in proceedings of this kind, where the issue is the unsoundness of mind of the testator, are required to prove either such a complete mental degeneration as denotes an utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of a specific insane delusion which affected the making of the will. Estate of Russell, supra. We are satisfied that contestants have not furnished proof of such a complete mental degeneration as would justify submitting the case to the jury, but they have furnished ample proof that decedent was suffering from an insane delusion in regard to the paternity of his sons and that this insane delusion affected the execution of his will.

In Estate of Russell, supra, the facts were very similar to the facts of the case now before us. In that case, like the one under review, a petition was presented for the revocation of the probate of a will. The jury returned a verdict in favor of the contestant and the judgment of revocation was affirmed on appeal. The testator left all of his property to his second wife and disinherited his adult daughter by a former marriage. He had married his second wife 27 years before his death. He lived with his first wife and children nearly 4 years, then suddenly abandoned them and did not communicate with them during the lifetime of the wife. After the death of his first wife he sought the contestant and for a long time treated her as his daughter. Witnesses for the proponents testified that he had told them that he came home one day and found a man in bed with his wife, and that was the reason he left. It does not appear, however, that he ever told this story to anyone until 40 years after the supposed occurrence. In that case, as in the present one, the testator late in life suffered with the delusion that his lineal descendant was illegitimate. In disposing of the contentions of the proponents the Supreme Court held that the belief on the part of the testator that the contestant was not his daughter was an insane delusion; that evidence of the statement of the testator concerning the conduct of his first wife was competent to prove that he believed in the truth of the statement at the time it was made but nevertheless, it was "pure hearsay and wholly valueless for the purpose of proving that such an incident had in fact occurred"; that the conclusion that the statement was true "is rebutted by the presumption of chastity". The following excerpt taken from the decision is especially appropriate to the facts of the case under review: "But when it is shown that the testator entertained no such belief or suspicion for a period of more than 40 years, such belief thereafter first appearing can be ascribed in reason only to some fact or circumstance or evidence which thereafter transpired. There being no such fact or circumstance or evidence disclosed, it remains only to ascribe the belief to the spontaneous generation of a diseased mind." [189 Cal. 759, 210 P. 254, 255.]

[4] Contestants in the present proceeding have made a stronger showing than was made by the contestant in the Russell case. Decedent lived with his wife for fifty-seven years without questioning her chastity, and the paternity of contestants, acknowledged for many years by decedent to be his sons and admitted by the pleadings to be his sons, was not questioned until after the "strokes" suffered by decedent late in life. There is not even the semblance of evidence to justify a belief on the part of decedent that contestants were illegitimate. If, as contended by contestants, decedent was suffering from the insane delusion that he was not their father, unquestionably the delusion affected the making of his will. Such was the ruling in the Russell case. The issue should have been submitted to the jury.

The judgment of nonsuit is reversed. The "judgment on demurrer" dated January 31, 1939, is affirmed. Appellants shall recover costs on appeal from respondent Nancy Adeline Mickelson.

We concur: MOORE, P. J., McCOMB, J.

## In re TODD'S ESTATE.*

## TODD v. TODD et al.

Civ. 6374.

District Court of Appeal, Third District, California.

Feb. 27, 1940.

Hearing Granted April 25, 1940.

**1. Wills ⇐552(1)**

The provision of Probate Code designed to prevent lapses of devises and legacies to relatives and bestow them upon their lineal descendants where lapse would otherwise occur is not intended to subvert will of testator where he has clearly expressed his intent that a lapse shall occur or a substitution be made. Probate Code, §§ 2, 92.

**2. Wills ⇐554**

"Substitution" with respect to wills is the putting of one person in the place of another so that he may, in default of ability of such other, or after him, have the benefit of the devise or legacy while a "substitutional gift" occurs when a provision is made in a will for some one to take the gift in the event of the death of the original beneficiary before the death of testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Substitution" and "Substitutional Gift".

**3. Wills ⇐552(1)**

Under will devising property in equal shares to testator's wife and son, "or the survivor of them," the words "or the survivor of them" evidenced intent of testator that if either wife or son died before testator and other survived him, such survivor should take entire gift, and hence son's child was not entitled to son's share by virtue of antilapse statute, where son died before testator. Probate Code, §§ 2, 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Or the Survivor of Them".

**4. Wills ⇐524(2)**

Generally, words of survivorship, as used in wills, are to be construed as referring to testator's death, where language of will does not clearly indicate that a subsequent date was intended.

**5. Descent and distribution ⇐47(1)**

A grandchild of testator is not a "presumptive heir" when its parent, the child of testator, is living, within statute giving the same share in estate as if testator had died intestate to presumptive heir unintentionally omitted from will. Probate Code, § 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumptive Heir".

**6. Descent and distribution ⇐47(1)**

The statute giving the same share in estate as if testator had died intestate, to child or "issue of any deceased child" unintentionally omitted from will, whether born before or after making of will or before or after death of testator, did not entitle grandson of testator, whose father was living at time of execution of will but not at testator's death, to share of estate as a pretermitted heir. Probate Code, § 90.

---

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Rush B. Todd, deceased, Bank of America National Trust & Savings Association, executor. From a decree of final distribution, which distributed the entire estate of the decedent to his surviving wife, Inez Todd, Ridgeway Addison Todd (a minor), by Gwen Overton Todd, his guardian, appeals.

Affirmed.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and Geary & Geary and C. J. Tauzer, of Santa Rosa, for appellant.

Grove J. Fink and Garton D. Keyston, both of San Francisco, for respondents.

PER CURIAM.

This is an appeal from a decree of final distribution, which distributed the entire estate of the decedent to his surviving wife, Inez Todd. Ridgeway Addison Todd, the minor grandson of decedent, presents this appeal upon the ground that the decree so distributing the entire estate to Inez Todd is contrary to law, in the following particulars:

First, the will of decedent makes no mention whatsoever of the grandson, Ridgeway Addison Todd, and therefore the grandson would be entitled to distribution to him of an undivided one-half of the estate as a pretermitted heir under the provisions of section 90 of the Probate Code.

* For subsequent opinion, see 109 P.2d 913.

Secondly, the father of said grandson, to-wit: Addison Todd, the son of the decedent, and who is named as a devisee in the will, predeceased the decedent, leaving him surviving his minor son, Ridgeway Addison Todd. Therefore the minor child would be entitled to distribution of one-half of the estate under the provisions of section 92 of the Probate Code, if he does not take as a pretermitted heir under section 90 of the Probate Code.

Thirdly, the rule enunciated in Estate of Childs, 21 Cal.App.2d 103, 68 P.2d 306 (which was followed in the instant case), disregards certain well-established principles of law and should not be accepted as a precedent.

The learned trial judge, Hilliard Comstock, has, we believe, correctly stated the law and the facts in this case, and we adopt his opinion as the opinion of this court, as follows:

"There are before the court the petitions of the executor and Ridgeway Addison Todd, a minor, by his guardian, Gwen Overton Todd, for distribution of the estate.

"Rush B. Todd made his will on February 17, 1925. Among the provisions thereof are the following:

"'Paragraph Third: I hereby declare that I am married, that my wife's name is Inez Todd, and that I have one child living, to-wit, a son, Addison Todd.

"'Paragraph Fourth: I hereby declare that all property standing in my name is my separate property.

"'Paragraph Fifth: I hereby give, devise and bequeath all of my estate, whether the same be real, personal or mixed, and of whatsoever kind or character, and wheresoever the same may be situated, of which I may die seized or possessed, equally, share and share alike, to my said wife, Inez Todd, and my said son, Addison Todd, or to the survivor of them.'

"Ridgeway Addison Todd was born on May 7, 1931. Addison Todd, the son of Rush Todd, deceased, died on September 28, 1935, and left surviving him, as his sole issue, Ridgeway Addison Todd.

"The proper distribution of the estate requires a construction of the quoted portions of the will.

"Section 92 of the Probate Code reads as follows:

"'*Death of devisee.* If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator.'

"Said section is based upon former sections 1310 and 1343 of the Civil Code, and agreeably to the language of section 2 of the Probate Code should be construed as continuations thereof and not as a new enactment. The first portion of Section 92 is practically identical with section 1343 of the Civil Code and the part following the semicolon and the word 'except' is in substance section 1310.

[1] "Provisions of statutes such as former section 1310 of the Civil Code and the corresponding portion of section 92 of the Probate Code are designed to prevent lapses of devises and legacies to relatives and bestow them upon their lineal descendants where a lapse would otherwise occur, but are not intended to subvert the will of the testator where he has clearly expressed his intent that a lapse shall occur or a substitution be made. Thus, in Estate of Goetz, 13 Cal.App. 292, 109 P. 492, where a legacy of $30,000 was provided for a nephew and by the will all legacies were to lapse and fall into the residue of the estate if legatees should die before the testator, and the nephew predeceased the testator and his children claimed the legacy by virtue of section 1310 of the Civil Code, it was held that the intent of the testator that a lapse should occur controlled even though in language less clear and distinct than that of the statute and that no legacy was provided for the children either by statute or by the will as the intent of the testator to direct the disposition of the fund otherwise could be ascertained.

[2] "'Substitution, with respect to wills, is the putting of one person in the place of another so that he may, in default of ability of such other, or after him, have the benefit of the devise or legacy. It is the act of the testator in naming a second devisee or legatee who is to take the gift on failure of the original beneficiary, or after

him. A gift is said to be substitutional when provision is made in the will for some one to take the gift in the event of the death of the original beneficiary before the death of the testator.' Thompson on Wills, p. 413, par. 276.

[3] "I agree with the argument of counsel for Inez Todd that the words 'or the survivor of them' found in the will would be practically meaningless if they were not held to evidence a clear intention of the testator that if either Inez Todd or Addison Todd died before the testator and the other survived the testator such survivor should take the entire gift. Such is clearly the effect of the greater weight of authority. The several cases cited by counsel support his position in this regard. The language employed in Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818, 819, was almost identical with that in the case at bar. The will provided 'To my cousins, Mrs. Sadie Holland and Wellington Frothingham, of said Brooklyn, children of Abraham R. Frothingham, in equal shares, or the survivor of them, I give the sum of five thousand ($5,000) dollars.'

"In construing the will the court said: 'The words "or the survivor of them" are meaningless unless she intended that the survivor [of them] should take the whole amount.'

"In our own state a strong indication of how the Supreme Court would construe the will in question is given in the language of Estate of Hittell, 141 Cal. 432, at page 436, 75 P. 53, 54. There the testator failed to anticipate changed conditions and made no provision for the event of the death during his lifetime of one of two named devisees, which, so said the court, 'he could easily have done, if he so desired, by giving the property to them, or to the survivor of them.'

"The guardian relies strongly upon the Illinois case of Schneller v. Schneller, 356 Ill. 89, 190 N.E. 121, 92 A.L.R. 838. If this case did not appear to me to be contrary to the views of the principal text writer, to the principles enunciated in the California cases above cited and the statutes in this state, and to the weight of authority as collected even in the annotations following the reported case itself in 92 A.L.R. commencing at page 846, it would be somewhat persuasive, though it seems to me to strain a point to uphold the statute of descents against the plain language of the will, under which the cardinal rule of construction should prevail. Its weight as authority is considerably shaken by the strong dissent of two justices and the qualified approval of the chief justice. The annotator gives special attention to what he styles the 'Illinois view' as a minority rule at page 859 et seq. of the annotation and on page 860 has this to say: 'The view of the Illinois court, that words of survivorship are not sufficient to defeat the operation of the statute against lapses, seems to have been carried to rather extreme lengths in the reported case (Schneller v. Schneller, 356 Ill. 89, 190 N.E. 121, 92 A.L.R. 838). In that case words of survivorship were attached to a gift of an absolute fee, which was neither postponed in possession by the gift of a previous life estate nor made subject to forfeiture upon the happening of a contingency; but, despite the fact that there did not appear to be any other time or contingency to which the words of survivorship could be referred other than the time of the testator's death, the court nevertheless held that they were not intended to refer to death before that of the testator. Vigorous dissent was expressed from this result by two justices, upon the ground that the use of the words of survivorship clearly and unambiguously showed that it was the testator's intention to provide for the contingency of one of the legatees dying before him.'

"The subsequent Illinois case of Hartwick v. Heberling, 364 Ill. 523, 4 N.E.2d 965, also somewhat shakes the authority of the Schneller case by limiting its application to its particular facts and applying the general rule that where a legatee dies before the testator and a clear intention to substitute another appears from the will the statute of descents does not apply.

[4] "The general rule where words of survivorship are used is that they are to be construed as referring to the testator's death, where the language of the will does not clearly and definitely indicate that a subsequent date was intended. Thompson on Wills, p. 404, par. 263. There is nothing in the Todd will that indicates that a subsequent date was intended and the general rule is in my opinion the proper one to apply. It is accordingly held that the intent of the testator was that if either Addison or Inez Todd died before he did the one of such beneficiaries who outlived the other should take the entire gift; that such words of survivorship expressed a clear intention of substitution and that

hence the latter portion of section 92 of the Probate Code (formerly section 1310 of the Civil Code) does not apply.

[5, 6] "But it is contended that even though the court should take the view expressed, Ridgeway Addison Todd takes the share his father would otherwise have taken as a pretermitted heir under Section 90 of the Probate Code. Said section and its former counterparts in the Civil Code have been held to apply only in favor of a child or the issue of a deceased child when he was a presumptive heir who was forgotten by the testator. A grandchild of a testator is not a presumptive heir when its parent, the child of testator, is living. Estate of Childs, 21 Cal.App.2d 103, 68 P. 2d 306; Estate of Barter, 86 Cal. 441, 25 P. 15; Estate of Ross, 140 Cal. 282, 73 P. 976. This rule under the authority of Estate of Childs, supra, has not been altered by the revised language of the Probate Code which changed the wording of the former Civil Code sections, and since that case has been determined by higher authority this court does not feel at liberty to hold to the contrary. A petition for hearing by the Supreme Court, after decision by the District Court of Appeal, was denied and the case stands as authority approved by our highest court. I do not agree that what was said concerning the construction of section 90 was mere dictum. An interpretation of the section was necessary to the decision and it was based primarily upon the construction adopted.

"Had the question been one of first impression, this court would have been strongly inclined to the belief that the change effected by the inclusion in section 90 of the Probate Code of the words, 'whether born before or after the making of the will or before or after the death of testator', which did not occur in the repealed section 1307 of the Civil Code, evidenced a legislative intent to depart from the rule of the Barter and Ross cases and grant to all children and issue of deceased children of the testator, whether born before or after the making of the will or before or after the death of the testator, the same protection as presumptive heirs were given under the rule of those cases. It seems to me unfortunate that the question arose in a case whose facts were peculiarly those of the Childs case, as the claim of the granddaughter in that case to a separate share of the estate under both section 90 and section 92 of the Probate Code presented a situation so apparently unconscionable that it may have influenced what appears to me to be a very strained construction of section 90. The reasoning employed is not at all satisfactory or convincing to me. It is as follows, 21 Cal.App.2d on page 105, 68 P.2d on page 307: 'We see nothing in these additional words which broaden the rights of petitioner. As pointed out in the Barter Case the words, "the issue of any deceased child," refer only to the issue of children who may have died before the time of the execution of the will. Nothing is contained in the sections of the Probate Code which indicate that a construction should be placed upon these words different from the construction which had been placed upon section 1307 of the Civil Code. To reach this conclusion it need not be held that the additional words inserted in section 90 are without significance. These words might serve to give protection to a grandchild born after the execution of the will whose parent was dead at the time of its execution.'

"It seems to me that even though 'as pointed out in the Barter case the words, "the issue of any deceased child" ', may in section 1307 of the Civil Code have meant only the issue of children who may have died before the time of the execution of the will, it is unreasonable to say that the added words in section 90 of the Probate Code do not clearly mean what they say and enlarge the class of issue intended to be benefited to all of those born after the making of the will as well as before and those born after as well as before the death of the testator. The rule of statutory construction requires that we shall look first to the plain language of the statute to determine its meaning. Are we then privileged to say in the case of the language used here that it does not mean the issue of a deceased son born after the making of the will but before the death of the testator? How else can the language, 'born before or after the making of the will', be given its full meaning and effect? It does not seem to me sufficient to reason that the words are not without significance because they 'might serve to give protection to a grandchild born after the execution of the will whose parent was dead at the time of its execution'. Such a contingency would rarely occur. So far as I am able to perceive, it would only happen in the case of a child of a son who was dead at the time of the execution, where

the child was en ventre sa mere at the time of the death of the son. Why should it be the legislative intent to protect the child of a son and not the child of a daughter in such circumstances? And where in section 90 is any intent of that sort expressed? The judicial effort should be to give full effect to the language actually used by the legislature, not to disregard its plain, broad significance and apply a narrow and unusual construction merely because the words are not wholly meaningless. To have inserted the words in question merely to protect a grandchild born after the execution of the will whose parent was dead at the time of its execution would have been an idle legislative act, for a child en ventre sa mere at the time of the execution of the will, under well established principles, would be presumed to have been living at that time and to be entitled to all the rights of succession of a child already born.

"Notwithstanding my inability to follow the reasoning applied in the Childs case or to agree with the logic thereof, I do not feel that I can disregard it as authority. It stands as the decision of a District Court of Appeal, approved by the Supreme Court, and I deem it to be binding upon this court. It would be presumptious, indeed, for a Superior Court to disregard or attempt to overrule the decision of higher courts of its own state where the application thereof to the problem at hand is so positive."

The decree of distribution from which this appeal is taken is hereby affirmed.

TUTTLE, Justice.

I concur in the opinion of the court, but do so with considerable reluctance in respect to the construction of section 90 of the Probate Code. As set forth in the opinion, the only authority for denying appellant any relief is Estate of Childs, 21 Cal. App.2d 103, 68 P.2d 306. The fact that the will gave the estate to the wife and to the son, "or to the survivor of them", does not affect the situation. If said section 90 is applicable, appellant will succeed "to the same share in the estate of the testator as if he had died intestate"—(quoting from the section)—and the provision for survivorship will not be operative. In my opinion that decision fails to give full effect to the amendment made to said section in 1931, which appears in direct language to place the issue of any child, whether born before or after the making of the will, in exactly the same category as any child of a testator who is omitted from the will. I feel, however, that we are bound by that opinion upon which a hearing was denied in the Supreme Court.




37 Cal.App.2d 491

**BEAM et al. v. DUGAN et al.**

**Civ. 11322.**

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1940.

Hearing Denied April 25, 1940.

**Appeal and error ⇐1195(3)**

A decision of the District Court of Appeal construing a conveyance of "landowner's royalty" as entitling grantees to a perpetual interest in royalties out of any oil produced, irrespective of under what lease such oil was produced, established the "law of the case" so that where theory upon which decision was founded was thereafter approved by the Supreme Court in another case, the trial court was limited to taking an account of profits from production of oil under whatever lease produced in accordance with prayer of complaint, and to determining the legal interest of grantees in accordance with the decision.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

Appeal from Superior Court, Los Angeles County; Donald Geary, Judge.

Action by S. K. Beam and another against John Dugan and others to quiet title and for an accounting. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

Hearing denied; CARTER, J., dissenting.

A. E. Garten and Vern E. Garten, both of Long Beach, and Clayton L. Howland, of Los Angeles, for appellants.

Jerry H. Powell, of Los Angeles, and Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondents John Dugan and Lena J. Dugan.

NOURSE, Presiding Justice.

Plaintiffs sued to quiet title and for an accounting, claiming under a sale and two assignments of portions of a landowner's royalty in oil and gas aggregating one per cent of the total royalty payable to their grantors. Defendants had judgment, and the plaintiffs appeal.

At the time of the conveyances to plaintiffs there was an outstanding oil and gas lease on the property, which had nineteen years yet to run, and which is referred to herein as the Dumas community lease. This lease was later surrendered when the oil well had proved dry, and a new lease was executed under which a new well was sunk a short distance from the other and oil was discovered in paying quantities. Plaintiffs claim, as grantees of the landowner, a share in the profits of the land, while the defendants claim that their rights were limited to a share of any proceeds which might have been received under the Dumas community lease only.

The pertinent portions of the conveyances, or assignments, under which the plaintiffs claim read:

"And whereas, S. K. Beam and Nora B. Beam, husband and wife, desires to purchase, and does hereby purchase a ⅜ of 1 per cent (1%) *landowner's royalty* in said above described property.

"Now, therefore, we * * * do hereby sell, transfer, convey, assign and set over to the said S. K. Beam and Nora B. Beam * * * *out of our landowner's royalty,* an undivided ⅜ of 1 per cent (1%) *in and to any and all oil, gas* or other hydro-carbon substances *produced or saved from any wells* to be drilled upon any of the land described in the lease heretofore mentioned * * * it being particularly understood and agreed that *the royalty interest, herein assigned, affects all the land mentioned in said lease and is not limited to* the land of said Dugans." (Italics ours.)

The cause was before this court on a former appeal. Beam v. Dugan, 132 Cal.App. 546, 23 P.2d 58, 60. It was then determined that plaintiffs' interest was not confined to the Dumas lease, but that they had secured from the landowner "such an interest in the royalties *paid under the second lease* as would entitle them to an accounting and an adjustment of their rights." When the cause was heard for the second time the trial court declined to follow this direction and found that plaintiffs had no interest whatever in the proceeds paid under the second lease, and were not entitled to an accounting. On this appeal we will disregard all the points raised by appellants except that of the "law of the case".

In the former opinion we discussed the conflicting rules concerning the rights obtained by purchasers under conveyances similar to those in this litigation; we referred to the line of decisions holding that the purchaser takes an interest in the oil and gas in place, and the line of decisions holding that he takes an interest running with the land similar to a profit a prendre. We also referred to the rule announced in Jones v. Pier, 124 Cal.App. 444, 12 P.2d 646, that the purchaser obtained an interest in common with the landowner in all oil and gas produced upon the land for the full term of the original lease, regardless of who produced the same. In that case, as here, the landowner canceled the lease outstanding when the interests were sold and all the proceeds of production arose under a new and independent lease. The appellate court recognized the vested interest of the purchaser and held that this could not be defeated by a cancellation of the original lease without his consent.

Since the decision on the former appeal, the Supreme Court approved the rule of Jones v. Pier, supra, and the holding of this court that the purchasers took an interest in the land in Callahan v. Martin, 3 Cal.2d 110, where, at page 125, 43 P.2d 788, at page 795, 101 A.L.R. 871, referring to Jones v. Pier, supra, it was said:

"The appellate court held that, under an assignment of oil royalty limited to the duration of a particular lease, the operating lease cannot be terminated by agreement between the lessors and operating lessee without the consent of the assignee of an oil interest. This decision was recognized with approval in Metzler & Co. of California v. Stevenson, 217 Cal. 236, 18 P.2d 330, and in Beam v. Dugan [supra], in which this court denied a petition for hearing.

"In Beam v. Dugan, supra, it was held that the rights of the assignee of oil royalty to share in oil produced extend not only to the lease in effect at the time the assignment is made, but to all future leases where the assignment of oil rights is unlimited in duration. In Jones v. Pier, supra, it was held that, where the assignee's rights are limited to a particular lease, said lease cannot be terminated without the assignee's

consent. Where, under the assignment of oil rights, the assignee's rights are not limited to a particular lease, but are in perpetuity, under the rule of Beam v. Dugan, supra, that the assignee's rights extend to oil produced under all leases, it must be held that such future leases cannot be terminated without the assignee's consent. It must follow, if such assignee must be a party to any lawful termination of leases, that he must have a right to participate in entering into new leases for production of oil upon the premises. We are of the view that an assignee of a royalty interest becomes in effect a tenant in common with his assignor who retains an interest in the oil rights, and with other assignees of percentage interests, in the right which the assignor had, by virtue of his ownership of the fee in the land, to drill for and produce oil."

In the Callahan case the Supreme Court adopts the prevailing rule recognizing oil royalties as rents and hence an assignment of oil royalty by a landowner "as a transfer of an interest in real property". Beam v. Dugan, supra, was cited by the court as one of the many California cases holding to that rule. In the former opinion this court endeavored to make clear that the plaintiffs' interests were not confined to the original lease, that "the appellants purchased some vested interest which they were entitled to have quieted in this proceeding" (132 Cal.App., page 552, 23 P.2d page 60); and that "the purchasers secured from the landowners such an interest in the royalties *paid under the second lease* as would entitle them to an accounting and an adjustment of their rights". Under this ruling the trial court was limited to the taking of an account of all profits from the production of oil and gas under whatever lease they should be produced. The appellants were entitled to a judgment for the recovery of the agreed percentage of such profits according to their several contracts.

As to the issue pleaded seeking to quiet their title, appellants' case now presents an interesting and novel problem. Following the opinion on the former appeal the Supreme Court in the Callahan case interpreted the judgment to mean that these appellants had a present estate or interest in the land, with the right to participate in entering into new leases for production of oil on the premises and that such an assignee or purchaser "becomes in effect a tenant in common with his assignor who retains an interest in the oil rights, and with other assignees of percentage interests, *in the right which the assignor had, by virtue of his ownership of the fee in the land, to drill for and produce oil*". (Italics ours.)

Hence, it is wholly immaterial whether the interests which the appellants have flow from any particular one of the three rules of decision mentioned in the former opinion. Such interests are no longer a question of fact to be determined by trial. It is now purely a matter of law—the appellants are entitled to participate in the proceeds of the production of oil and gas upon the premises in accordance with the settled rules of law heretofore noted. When the former opinion was written we noted the confusion in the decisions and the conflict of authority as to the *theory* upon which rights such as those asserted by plaintiffs were recognized in the law. Following that decision the Supreme Court in Callahan v. Martin, supra, and Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237, 243, rejected the "oil and gas in place" doctrine, but plainly ruled in the latter case that "oil rights may be recognized and transferred as interests in real property on other theories which give due recognition to the fugacious character of the substances involved". In the same case the court approved the finding of the trial court as based upon "the abundance of evidence offered to show that the term 'landowner's royalty,' unless clearly and unequivocally limited to royalty payable under a particular lease, was generally regarded in Southern California as an unlimited, permanent interest, in contrast with interests created by lessees, which by necessity must fall with the lease".

A further reason for so holding was thus stated: "Language of a grant is to be construed most strongly against the grantor. An assignment of oil royalty limited to a particular lease is precarious. Not only may the assignee's rights be terminated where the lessee wrongfully abandons the lease, but oil leases frequently contain rather broad provisions giving the lessee the right to terminate lawfully in specified contingencies. An intent to thus limit the rights of the assignee should be clearly and unequivocally indicated."

In our former opinion we referred to the same rule of construction of written instruments and to the abundance of evidence of the settled custom in the community recognizing a "landowner's royalty" as a

"perpetual interest not limited to any particular lease". For these reasons we then held that "the purchasers secured from the landowners such an interest *in the royalties paid under the second lease* as would entitle them to an accounting and an adjustment of their rights".

We have in the former opinion an interpretation of the written instruments under which the appellants claim. Whether this interpretation be right or wrong it is now final and conclusive. It is settled law that constructions of written instruments are decisions upon questions of law and become the law of the case when the retrial is heard upon the same or merely cumulative evidence. 2 Cal.Jur., p. 1046. See Jones v. Pier, 12 Cal.App.2d 282, 55 P.2d 259. This then was the "case" which the trial court had for decision—a ruling upon the law that plaintiffs had an interest in the proceeds from oil and gas production irrespective of the original lease. The theory upon which such interest is founded has since been determined by the Supreme Court, and the plaintiffs were therefore entitled to an accounting and to a determination of their legal interests as herein stated.

There is no need, therefore, for a retrial of any issue of fact, except in relation to the accounting of profits due unless the parties should stipulate as to such amount. The complaint herein was filed November 6, 1929. This is the second trial and the second appeal, and the voluminous transcript shows that the expense of the litigation has been high. There is no sound reason why this expense should be increased or the litigation prolonged. The parties having stipulated that there was impounded and held on hand at the time of the trial the sum of $5,501.86 as representing the full one per cent of the proceeds from the production of said property up to the time of trial, the trial court is directed, upon entry of the remittitur, to order paid to plaintiffs forthwith so much thereof as is due them, and thereupon to take an accounting, if such is necessary, to determine whether any further sum has become due plaintiffs, and to enter judgment therefor, and to quiet the title of plaintiffs as prayed, in accordance with the views herein expressed.

The judgment is reversed with the directions heretofore noted.

We concur: STURTEVANT, J.; SPENCE, J.



37 Cal.App.2d 502

## SAN BERNARDINO COUNTY SAV. BANK v. ADAMS et al.

Civ. 2465.

District Court of Appeal, Fourth District. California.

Feb. 28, 1940.

**Appeal and error ⇐640**

Where so-called clerk's transcript of order refusing to issue execution after five years from entry of judgment bore county clerk's certificate that copies of records contained in transcript were correct, but there was no certificate of trial judge nor bill of exceptions, there was not sufficient record to permit a review of order and appeal would be dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 29.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Proceeding by the San Bernardino County Savings Bank against Claud A. Adams and another. From an order refusing to issue execution after five years from entry of a judgment, plaintiff appeals. On defendants' motion to dismiss the appeal.

Appeal dismissed.

John A. Hadaller, of San Bernardino, for appellant.

Harry H. Parsons, of San Bernardino, and Walter G. Danielson, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from an order refusing to issue execution after five years from the entry of judgment.

Respondents have moved to dismiss the appeal on two grounds: (1) That the request for the transcript was not filed within ten days after notice of entry of the order, and (2) because no record has been filed supporting the appeal from the order.

The order was made on July 12, 1939. Notice of its entry was served on August 1, 1939. A request for a transcript was filed on August 30, 1939, more than ten days after notice of the entry of the order.

A so-called clerk's transcript was filed on October 18, 1939. Besides a copy of the judgment roll in the original action in which the judgment was rendered on July 19, 1930, there are attached thereto a notice of motion to issue execution after the lapse of five years from the entry of judgment, various affidavits in support of and in opposition to the motion, minute order denying the motion, and copies of other papers.

The transcript bears the certificate of the county clerk that the copies of the records it contains are true and correct. There is no certificate of the trial judge and no bill of exceptions. (See rule XXIX, Rules for the Supreme Court and District Courts of Appeal.)

Under similar circumstances we have held that there is no sufficient record to permit us to review the order. Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912; Salinas v. Riverside Finance Co., 126 Cal. App. 675, 14 P.2d 1025; Johnson v. Johnson, 133 Cal.App. 151, 23 P.2d 780; Santa Ana, etc., Co. v. E. Rurup Estate, 23 Cal. App.2d 445, 73 P.2d 908; Mason v. Coalinga Union H. S. Dist., 31 Cal.App.2d 317, 87 P.2d 921. See, also, Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.




37 Cal.App.2d 475

## PATON v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 11187.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1940.

1. Bail ⇐73

The court did not have jurisdiction to appropriate bail money deposited by a third person for the appearance of defendant in a criminal action to the payment of a fine imposed upon such defendant.

2. Bail ⇐79(2)

Where trial court improperly ordered the appropriation of bail money deposited by third person to payment of fine imposed upon defendant, such order could be annulled in proceeding by petition for review, but title to the bail deposit should be determined in a separate proceeding.

3. Action ⇐63

There must be a showing of damage in order to support the defense of laches.

4. Bail ⇐79(2)

On petition to review orders appropriating to the payment of a fine bail money deposited by third person, any defense based on delay must be eliminated where it was admitted that county was not prejudiced by the delay.

Petition by Eugene Paton, individually and as president of the International Longshoremen's and Warehousemen's Union, Local 1–6, against the Superior Court of the State of California, in and for the County of Contra Costa, and another, to review an order forfeiting money deposited by petitioner as bail in criminal proceedings.

Orders annulled.

Gladstein, Grossman & Margolis, of San Francisco, for petitioner.

Francis P. Healey, Dist. Atty., of Richmond, and J. Vance Porlier, Deputy Dist. Atty., of Martinez, for respondents.

WARD, Justice.

This is a petition to review an order of the Superior Court of the State of California, in and for the County of Contra Costa, forfeiting certain money deposited by petitioner as bail to secure the release of four defendants charged with, and subsequently convicted of, criminal offenses.

After trial and following verdicts by a jury, the judgments in three of the cases directed that the respective defendants be punished by imprisonment in the county jail for the term of thirty days and by the payment of a fine in each case in the sum of $250; that in the event of the failure to pay the fine the defendant be confined in the county jail one day for each two dollars of said fine remaining unpaid.

In the case of the fourth defendant, while the amount of the fine was the same, the period of confinement in the county jail was fixed at six months.

The four orders sought to be reviewed each set forth in substance that the named defendant had been convicted of a misdemeanor, to-wit, violation of section 148 of the Penal Code; that bail had been deposited pending determination of appeal; that each appeal had been dismissed; that the respective remittiturs from the appellate court had been received and filed and that each defendant had surrendered himself into the custody of the sheriff to serve the sentence directed in the judgment. The court thereupon adjudged and decreed that from the deposited bail the county should retain as and in satisfaction of the fines the sum noted in each judgment. Subsequently, a motion to vacate the orders applying to the payment of the fines part of the deposited bail was denied, as was also a motion to exonerate the bail deposit. This petition for a writ of review was subsequently filed.

[1, 2] The question involved in this particular proceeding is practically identical with the subject of review in Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, namely, the legality of an order by the court appropriating bail money deposited by a third party for the appearance of a defendant in a criminal action to the payment of a fine imposed upon the defendant. The decision in the Rodman case, holding that the action of the trial court was in excess of its jurisdiction, is applicable here. This is not to be construed, however, as giving affirmative relief; that is, as a ruling on the question of title to the bail deposit, which question may be determined in a separate proceeding.

[3, 4] Respondents upon appeal raise the defense of laches. There must be a showing of damage in order to support such a defense. Upon the oral argument, respondents, through counsel, admitted that no particular damage had resulted through delay and that the county was not prejudiced thereby. We therefore eliminate any defense based thereon. Security-First National Bank v. Superior Court, 132 Cal.App. 683, 23 P.2d 1055.

The orders in question are annulled.

We concur: PETERS, P. J.; KNIGHT, J.

37 Cal.App.2d 477

## PATON v. TEETER, County Auditor.

Civ. 10999.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1940.

**1. Bail ⇐73**

In absence of statutory provision, cash bail may not be accepted in lieu of a bail bond.

**2. Bail ⇐73**

If cash rather than bail bond is deposited in good faith, person furnishing it is estopped from claiming that court had no authority to receive it, and the governmental agency may not claim that such person may not recover because agency was not authorized to accept.

**3. Evidence ⇐83(4)**

Court must assume that county officials performed their duty and paid fine, which court had directed should be paid out of the deposited bail, into the county treasury where it became property of the county. Pen.Code, §§ 1297, 1570.

**4. Bail ⇐79(2)**
**Mandamus ⇐3(8)**

Where court improperly directed fine to be paid out of cash bail deposited by third person, third person's proper remedy was statutory procedure by claim against the county, and writ of mandate was not available to compel county auditor to refund the bail. Pol.Code, §§ 4075, 4076, 4091, 4123.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Petition by Eugene Paton, individually and as president of the International Longshoremen's and Warehousemen's Union, Local 1–6, for writ of mandate to compel D. M. Teeter, County Auditor of Contra Costa County, to draw warrant for refund of deposited bail. From a judgment sustaining a general demurrer, petitioner appeals.

Affirmed.

Gladstein, Grossman & Margolis, of San Francisco, for petitioner.

Francis P. Healey, Dist. Atty., of Richmond, and J. Vance Porlier, Deputy Dist. Atty., of Martinez, for respondent.

WARD, Justice.

This is an appeal from a judgment sustaining a general demurrer, without leave to amend, to a petition for a writ of mandate to compel a county auditor to draw his warrant for a specified sum as a refund of deposited bail. The question involved is whether a writ of mandate is an appropriate remedy. The facts applicable to this petition will be found in Paton v. Superior Court, Cal.App., 99 P.2d 698, filed this date.

The point suggested by this court after the first oral argument, and considered upon the second oral argument and subsequently in briefs, is, assuming the order, directing that an amount be retained out of a bail deposit as payment of a fine, must be annulled before relief is sought, would an order commanding the county auditor to draw his warrant for the return of the money be proper in the absence from the record of any evidence that there had been a compliance with section 4075 of the Political Code, which provides: "All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the board of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part."

The money involved in this proceeding is the sum of $1,000 which was ordered retained, from an amount of $10,000 bail deposited, and applied to the payment of fines imposed on four criminal defendants.

The statutory provision for the application of a cash deposit in satisfaction of a fine is section 1297 of the Penal Code. Assuming that the orders providing that part of the bail be applied in satisfaction of the fines imposed were in excess of the jurisdiction of the court, nevertheless the orders resulted in the deposit, without the direct jurisdiction of the court and within the control of the board of supervisors, of the disputed amount.

[1, 2] In the absence of statutory provision, cash bail may not be accepted in lieu of a bail bond. Rodman v. Superior Court, 13 Cal.2d 262, 269, 89 P.2d 109. Eliminating the question as to whether or not the court improperly accepted cash bail, and assuming that a contract had been entered into between the bondsman and the state for the appearance of the defendants, we are not inclined to hold that the money thus accepted may not be recovered if the deposit of cash as bail was made in good faith. In other words, if one furnishing the wrong type of security, as in this case, cash in lieu of a bond, is estopped to claim that the court had no authority under the statute to receive the particular deposit as required (Kirschbaum v. Mayn, 76 Mont. 320, 246 P. 953, 48 A.L.R. 1425), so the respondent herein as a governmental agency may not successfully claim that because it was unauthorized to accept the cash, appellant may not recover. If the course pursued resulted in a mutual mistake, the respondent may not take advantage of the irregularity. Butler v. Hastings, 139 Cal.App. 641, 34 P.2d 751.

[3, 4] The order in effect directs that the $1,000 be turned over to the county treasurer. Pen.Code, sec. 1570. We must assume that the county officials performed their duty and that this "fine" for the criminal offense was paid into the county treasury for its use and benefit and that, in the absence of statutory provision directing its deposit in a special fund, it became the property of the county. After money is received by a county treasurer, he is not permitted to pay out any portion thereof except as authorized by law. When the deposit ceases to be under the direct control of the court, and becomes the property of the county for its own use and benefit as distinguished from a deposit in a special fund, such as a bail deposit, then section 4076 of the Political Code forbids the withdrawal thereof except by claim against the county, and if the claim is rejected, then by suit. On certiorari the entire record may be reviewed for jurisdictional error. In this proceeding in mandate, we are interested only in the prayer to command the county auditor to draw his warrant for the amount of the fines.

Assuming that the amount in question was mistakenly delivered to the county for its use and benefit, we are confronted with section 4123 of the Political Code provid-

ing: "Any money other than taxes, erroneously paid in to the county treasurer, may be returned to the person paying it in, upon a warrant drawn by the county auditor on the order of the board of supervisors, based upon such voucher as will show proper evidence of the facts." See, also, sec. 4091, Pol.Code. In the absence of proof of compliance with section 4075 of the Political Code, mandate is not available. As may be noted in Paton v. Superior Court, supra, the orders directing the retention of part of the bail have been ordered annulled. Petitioner must follow the method of procedure provided by the statute.

Judgment after order sustaining demurrer without leave to amend is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

36 Cal.App.2d 478

## DUNLAVY v. NEAD et al.

Civ. 6241 (3).

Supreme Court of California.

March 9, 1940.

**Master and servant ⇐304**

In determining whether an employer is liable in a personal injury action for the negligence of his employee, the test is not only whether the employee knew of the presence of the injured person, but whether he had reason to expect the presence of that person within the range of his negligent acts.

---

In Bank.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Leo Dunlavy against H. C. Nead, H. H. Tweed, and Chris Valenzuala to recover damages for personal injuries. Judgment was rendered in favor of the defendants. On petition by the plaintiff for a hearing by the Supreme Court.

Petition denied.

Prior opinion, 97 P.2d 1003.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellant.

Rowan Hardin, of Sonora, for respondents.

PER CURIAM.

In denying appellant's petition for a hearing by this court in this case, we withhold our approval from that portion of the opinion of the District Court of Appeal, holding to the effect that actual knowledge on the part of defendant's employee of plaintiff's presence was necessary to establish liability of the defendants for plaintiff's injury, as the test is not only whether the defendant engaged in the commission of the negligent act knew of, but also whether he had reason to expect the presence of the person injured within the range of his negligent acts. Hamakawa v. Crescent Wharf, etc., Co., 4 Cal.2d 499, 50 P.2d 803.

37 Cal.App.2d 541

## ADAMS v. BOYCE et al.

Civ. 11953.

District Court of Appeal, Second District, Division 1, California.

Feb. 29, 1940.

Rehearing Denied March 25, 1940.

Hearing Denied April 29, 1940.

**1. Assault and battery ⇐42**
**Physicians and surgeons ⇐18(9)**

In action for alleged malpractice and assault and battery in treating plaintiff's right eye, trial court properly granted a nonsuit in favor of physician who took X-ray pictures of eye at hospital, where there was no showing that physician was careless, negligent, or unskillful in taking pictures and no evidence that pictures were at any time used by any other physicians for any purpose.

**2. Assault and battery ⇐42**
**Physicians and surgeons ⇐18(9)**

In action for alleged malpractice and assault and battery in treatment of plaintiff's right eye, trial court properly granted a nonsuit in favor of physician who took certain X-ray pictures of eye for purpose of localizing foreign body therein, where there was no evidence of negligence, carelessness, or lack of skill on physician's part, and foreign body was found by operating surgeons to be in approximately the position stated in physician's localization report.

**3. Assault and battery ⇐42**
**Physicians and surgeons ⇐18(9)**

In action for alleged malpractice and assault and battery in treatment of plaintiff's right eye, trial court, under evidence, properly granted a nonsuit in favor of physicians who examined eye and advised operating surgeon that if he could not get foreign body out with a magnet, and it was not magnetic, they did not advise further surgery.

**4. Physicians and surgeons ⇐14(4)**

The law requires of a physician only that he have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the locality, and that he exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case.

**5. Physicians and surgeons ⇐14(4)**

A physician and surgeon by taking charge of a case impliedly represents that

he possesses, and the law places on him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery.

**6. Physicians and surgeons ⇐14(1)**

Upon consenting to treat a patient, it becomes the duty of a physician and surgeon to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed, and he is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.

**7. Physicians and surgeons ⇐14(3, 4)**

A physician and surgeon cannot be required to guarantee results, and all that the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.

**8. Physicians and surgeons ⇐15**

In a malpractice action, it is not enough to show that the physician has not treated his patient in that mode or used those measures which in the opinion of others, even medical men, the case required, since such evidence tends to prove errors of judgment, for which the physician is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.

**9. Physicians and surgeons ⇐15**

Where due care, diligence, judgment, and skill are exercised by a physician, a mere failure to diagnose correctly does not render physician liable for alleged malpractice.

**10. Physicians and surgeons ⇐14(4)**

The implied contract on the part of a physician is that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will exercise reasonable and ordinary care and skill in the application of that learning to accomplish the purpose for which he is employed.

**11. Physicians and surgeons ⇐18(8)**

In a malpractice action, what is or is not the proper practice is a question for experts, and it can be established only by their testimony.

**12. Assault and battery ⇐42**
**Physicians and surgeons ⇐18(9)**

In action for alleged malpractice and assault and battery in treatment of plaintiff's right eye, trial court properly granted a nonsuit in favor of operating surgeons who resorted to surgery after use of magnet proved ineffective in their effort to dislodge foreign body from eye, where there was no expert testimony that their diagnosis was incorrect or concerning what method or means in the exercise of ordinary care and skill other than that used by them should have been employed in an attempt to remove foreign body from eye.

**13. Assault and battery ⇐42**
**Hospitals ⇐8**

In action for alleged malpractice and assault and battery in treatment of plaintiff's right eye, trial court properly granted a nonsuit in favor of hospital where plaintiff was treated, where there was no evidence other than that agreement between plaintiff and hospital contemplated that plaintiff should receive the usual and ordinary services rendered a patient, and testimony showed that treatment accorded plaintiff by hospital was entirely consistent with ordinary skill and care.

**14. Assault and battery ⇐26, 35**
**Physicians and surgeons ⇐18(6, 8)**

In action for alleged malpractice and assault and battery in treatment of plaintiff's right eye, the doctrine of "res ipsa loquitur" was not applicable where operating surgeons resorted to surgery when use of magnet proved ineffective in their effort to dislodge foreign body from eye, and before plaintiff could recover, he was required to show by expert testimony that the defendant physicians, surgeons, and hospital failed to use the degree of care and skill ordinarily exercised by others in the community.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur."

---

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Melville Adams against Dr. William A. Boyce and others for alleged malpractice and assault and battery. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Melville Adams, in pro. per.

W. I. Gilbert, of Los Angeles, for respondents Dr. William A. Boyce, Dr. John Brady Rogers, Dr. A. Ray Irvine, and Dr. Rodman Irvine.

Elber H. Tilson, of Los Angeles, for respondents Dr. Edward S. Blaine and Dr. H. A. Judson.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for respondent Lutheran Hospital Soc. of Southern California.

WHITE, Justice.

This is an appeal by plaintiff from a judgment of nonsuit in an action for alleged malpractice and assault and battery on the part of several doctors and a hospital. It is claimed that by reason of the alleged negligent acts of the defendants plaintiff lost the sight of his right eye.

The second amended complaint attempts to set up seven causes of action. The seventh cause of action relates to all defendants, and as to the other causes of action, the first has reference to the defendant hospital; the second to defendant doctors Boyce and Rogers; the third to defendant hospital and defendant doctors just mentioned; the fourth to the two defendant doctors Irvine; the fifth to defendant Dr. Blaine; and the sixth to defendant Dr. Judson. The cause was tried before the court sitting with a jury. At the conclusion of the plaintiff's case the court granted a nonsuit as to all defendants, and from the judgment entered thereon plaintiff prosecutes this appeal.

Clarity in disposing of the points raised on this appeal will be aided by here presenting an epitome of plaintiff's case as the same is revealed by the record. On the morning of November 27, 1935, while constructing an addition to his home at Venice in the county of Los Angeles, plaintiff was attempting to separate two 2 x 4's which were nailed together. In this process he was using a carpenter's wrecking bar upon which he was hammering with a hammer, while holding the bar across his thighs. Suddenly he felt something strike his right eye with a resultant severe burning pain lasting for approximately a half hour. He then looked into a mirror and observed a small red spot in the extreme right corner of his eye. Plaintiff then went to Santa Monica, where he had three X-rays of his injured eye taken by Miss Frances Davis. That same afternoon he consulted Dr. Carl H. Ballard, who examined the eye and attempted to secure from a hospital, the latter not being a party to this action, the use of what is termed a "giant magnet", used for withdrawing foreign objects such as steel from the eye without further injury thereto. Permission to use the magnet was refused by the hospital in question because Dr. Ballard was not a member of the staff of such hospital. The following day plaintiff attempted to obtain treatment at the General Hospital of Los Angeles county, at which institution plaintiff's eye was X-rayed by defendant Dr. H. A. Judson, and where plaintiff first met defendant Dr. Boyce, with whom he talked concerning his injury and the treatment thereof. Refused admittance to the County Hospital for treatment, plaintiff claims that upon recommendation of defendant Dr. Boyce he went to defendant California Hospital on November 29th and was admitted as a patient. Plaintiff further contends that at the time of his admission to the California Hospital he was asked by the admitting nurse if he "had a doctor" or "knew any doctors", to which he replied that he had met defendant Dr. Boyce that morning at the General Hospital and inquired of the admitting nurse if she "knew anything about Dr. Boyce", to which it is claimed the hospital attendant replied, "Dr. Boyce is on our staff and he is one of the best eye doctors in the city"; whereupon plaintiff states he said, "I am leaving it—I am looking to you to get the best doctor available to do what I want done here". Plaintiff further contends that shortly thereafter he was advised by the admitting nurse that she had tried to talk to Dr. Boyce, but that the latter was out, whereupon plaintiff himself left the hospital for lunch, returning about 1 o'clock, at which time the admitting nurse called defendant Dr. Boyce on the phone and handed the phone to plaintiff, at which time plaintiff contends defendant Dr. Boyce said, "I am going to handle your case—you get a room * * * and as soon as they have located the foreign body I will come over * * * and operate on you."

Being then assigned to a room, plaintiff contends he went to the room and to bed, where he remained until about 3 o'clock, at which time defendant Dr. Boyce talked to plaintiff on the telephone, saying, "I understand they have not diagnosed the foreign body yet. If they don't take care of you or X-ray you within twenty minutes, you can put on your clothes and come down to my

office." After waiting some twenty minutes, appellant went to defendant Dr. Boyce's office in the Roosevelt building, and was by such doctor taken to defendant Dr. Blaine's office in the same building, and X-ray pictures were taken by the last-named doctor.

It further appears from plaintiff's testimony that he returned to the defendant hospital after Dr. Boyce had told him that he would "be over there at five o'clock to operate on you". Taken to the operating room, where two nurses were present with defendant doctors Boyce and Rogers, plaintiff in describing the operation states that "Dr. Rogers washed around the area of his eye and covered his left eye with a bandage; that Dr. Boyce stuck something in both his upper and lower lids; * * * that Dr. Boyce held a pair of scissors up above appellant's eye; that about that time a nurse entered, telling Dr. Boyce that Dr. Blaine wanted to talk to him on the telephone; that Dr. Boyce went to the telephone and came back, saying, 'Fourteen millimeters, that checks with the county.'" Appellant further testified concerning the operation: "I felt a twisting motion on my side and all of a sudden there was a give and it seemed like he pushed something in my eye. All the time my eye was looking straight up. He then asked the nurse for the magnet and the nurse lifted the magnet up onto the operating table. * * * then I could hear a humming sound; * * * it didn't vary as though there was any movement of the magnet; pretty soon Dr. Boyce says, 'I can't find it, and it isn't magnetic.' I then stated to Dr. Boyce and Dr. Rogers that the steel chip hit the eye way over on one side; that the first redness appeared over on the side and that the X-rays showed it way over on the side * * * and that Dr. Ballard had told me that he thought it was way over in the skin, on the outside of the eye. * * * Then stood there looking at me for a minute and then Dr. Boyce asked the nurse for something and he squeezed something into my eye and wiped it out, put a patch on, and I was taken down to my room."

The operation proper was described by defendant Dr. Boyce as follows: "After the eye was anesthetized the conjunctiva was picked up approximately over this foreign body and was dissected back over this foreign body, exposing this sclera—that is that dense solid membrane, the sclera. Then a little opening was made in the wall of the eye with a cataract knife, just a tiny little opening, and then the magnet was put up against this opening and the current turned on. That was done at least a dozen times and no foreign body came. And then after I saw that the magnet was not going to pull the foreign body, I took a tiny little pair of iris scissors—* * *" (The scissors and a knife with which the incision was made were then exhibited.) "The incision was just as wide as that little knife. * * * The cataract knife * * * a cataract knife. Then after we could not get the foreign body with the magnet—it seemed to be non-magnetic, wouldn't come to the magnet—I introduced the tip end of a little pair of scissors about four millimeters—that would make it just about that far" (indicating) "into approximately where this foreign body was, getting it close. I did that in preference to putting the tip of the magnet, because the magnet is a great big thing and would have enlarged the wound. I used the scissors, because the scissors are the best type of steel; and by putting the scissors into that little opening, almost in contact with the foreign body, then putting up the magnet—touching the magnet on that, on the scissors * * * somewhere on the scissors. I don't remember the exact spot."

Subsequently, on the morning of December 2d, defendant Dr. Boyce brought plaintiff to defendant doctors Irvine's office, where the latter two doctors looked into plaintiff's eye with an ophthalmoscope and saw the foreign body still within the eye. On the following Thursday plaintiff's eye was swollen shut, whereupon he went to defendant Dr. Boyce, who, according to plaintiff, looked in the latter's eye without an instrument and said, "My God, something's happened. You have panophthalmitis," and suggested that plaintiff go to a local hospital for injection of foreign protein and then keep hot applications on his eye two hours on and one off for ten days. Plaintiff further testified that Dr. Boyce stated he could do no more for plaintiff and that the latter should "go to Santa Monica and get taken care of locally". It is alleged by plaintiff that by reason of the negligence of the defendants in the performance of the operation in question there ensued "an irritation of the tissues and an infection in said eyeball and eye which resulted in an inflammation of said eyeball and eye and panophthalmitis, and iritis, and other injuries", culminating in "the total loss and de-

struction of the use and sight of his said right eye and seriously endangered plaintiff's left eye so that for several months plaintiff was threatened with total blindness".

[1] As to the correctness of the court's order granting a nonsuit in favor of defendant Dr. H. A. Judson, there can be no question, because the record is barren of any evidence proving or even tending to prove negligence on his part. The only testimony as to Dr. Judson is that he took X-ray pictures of plaintiff's eye at the General Hospital, and there is no showing that in the taking of said pictures Dr. Judson was careless, negligent or unskilful in any way. Further, there is no evidence whatever that such X-ray pictures were at any time used by any of the physicians in the treatment rendered or for diagnostic purposes, or in fact for any purpose whatever.

[2] Equally bereft is the record of any evidence of negligence, carelessness or lack of skill on the part of defendant Dr. Edward S. Blaine. At the request of the operating surgeon, Dr. Boyce, the defendant Dr. Blaine took certain X-ray pictures of appellant's injured eye for the purpose of localizing the foreign body therein. Subsequent to the taking of such pictures the defendant Dr. Blaine reported to Dr. Boyce the location of the foreign body in appellant's eye as disclosed by the X-ray pictures. When defendant doctors Boyce and Rogers operated on appellant's eye in an attempt to remove the foreign body therefrom, after penetrating the eyeball the foreign body was disclosed as being in approximately the position stated in Dr. Blaine's localization report. As to defendant Dr. Blaine, the nonsuit was properly granted.

[3] What we have just said with reference to the absence of any showing of negligence, carelessness or unskilfulness concerning defendant doctors Judson and Blaine is equally applicable to the situation as it concerns defendant doctors A. Ray and Rodman Irvine. As to these defendants it appears that on the evening of November 27th appellant called Dr. A. Ray Irvine on the telephone and asked for an appointment. After some discussion of appellant's ailment, an appointment was made for the following morning at the Eye and Ear Hospital, which appointment appellant did not keep. On December 2nd, appellant visited Drs. Irvine at their office in company with defendant Dr. Boyce, who had theretofore told Dr. A. Ray Irvine of the former's attempt to remove a foreign body from appellant's eye. On this occasion Dr. A. Ray Irvine looked into appellant's eye with an ophthalmoscope and saw a foreign body in the eye. Dr. Rodman Irvine also examined the eye on this occasion. During this examination a small magnet was held beside appellant's eye, and the elder Dr. Irvine said, referring to the foreign object in the eye, when he applied the magnet, "It didn't move." Thereafter defendant doctors Irvine advised Dr. Boyce that "If you could not get it out with a magnet and it was not magnetic, we do not advise further surgery." In the light of what we have heretofore said and shall hereafter say, it is at once apparent that the diagnosis and expression of opinion by the doctors Irvine did not constitute malpractice, and it was the duty of the court to grant a nonsuit as to such defendants.

[4] The law on the subject of the care and skill required of physicians in the treatment of patients is well settled, and was epitomized in the case of Hesler v. California Hospital Co., 178 Cal. 764, 767, 174 P. 654, 655, where it was said that the law requires of the physician only "first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality; and, second, that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case. The law takes cognizance of human weakness and liability to err in the application of skill and learning and it requires only the exercise of reasonable and ordinary care and diligence to avoid error."

[5-8] Concerning the obligations assumed by a physician when he undertakes to treat a patient, it is said in the same case at page 766 of 178 Cal. at page 655 of 174 P.: "'A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his

learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.' Pike v. Honsinger, 155 N.Y. [201], 209, 49 N.E. [760], 762, 63 Am.St. Rep. 655. 'The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.' Zoterell v. Repp, 187 Mich. [319], 330, 153 N.W. [692], 695. 'It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.' Leighton v. Sargent, 27 N.H. [460], 474, 59 Am.Dec. 388."

The case before us is not of that type discussed in Thomsen v. Burgeson, 26 Cal. App.2d 235, 79 P.2d 136, where during the performance of the surgical or other skilled operation an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject.

[9-12] With these rules in mind, we now turn to a consideration of the claimed liability of defendant doctors William A. Boyce, John Brady Rogers, and defendant Lutheran Hospital Society of Southern California, operator of the California Hospital. It is the contention of appellant that he went to the hospital and sought medical aid to have only certain things done, viz., the foreign body removed from his eye by the use of a "giant magnet". However, we think the evidence indicates that appellant placed himself under the professional care of these physicians for the purpose of having the foreign body removed from his eye. The operating doctors did use the magnet, but it proved ineffective in their effort to dislodge the object from the eye, whereupon they resorted to surgery. Appellant predicates his action on the theory of negligent diagnosis on the part of defendant doctors, claiming there was error in locating the position of the foreign object and error in the determination that it was not magnetic. Assuming that the record presented a case of mistaken diagnosis, it is totally lacking in any incidents of carelessness or unskilfulness necessary to constitute actionable negligence. When due care, diligence, judgment and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. In the present case, however, we are impressed with the fact that a mistake in diagnosis was not proved. It has been held in this state that the implied contract on the part of the physician is that he possesses that reasonable degree of learning and skill possessed by others of his profession, and that he will exercise reasonable and ordinary care and skill in the application of that learning to accomplish the purpose for which he is employed. Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128. As to what is or is not the proper practice in a case such as this is uniformly a question for experts and can be established only by their testimony. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642; Houghton v. Dickson, supra. In the case before us there was no expert testimony as to the diagnosis being incorrect, nor as to what method or means in the exercise of ordinary care and skill, other than that used by the operating physicians, should have been employed in an attempt to remove the foreign body from the eye of appellant.

[13] As to respondent Lutheran Hospital Society, nowhere in the record is our attention directed to any evidence other than that the agreement between appellant and the hospital contemplated that the former was to receive the usual and ordinary services rendered a patient, while the testimony points unerringly to the fact that the treatment accorded appellant by the hospital was entirely consistent with ordinary skill and care. There is no merit in appellant's claim that the services of the operating surgeon, Dr. Boyce, were furnished and provided by respondent hospital. Appellant met Dr. Boyce at the County General Hospital before he entered respondent hospital, and he it was who first mentioned Dr. Boyce at the hospital, at which time the attendant there stated that the doctor was a member of the staff of the hospital and was highly regarded in his profession. What we have hereinbefore said disposes of appellant's claim that he was the victim of assault and battery. By word and action appellant submitted himself to the professional care of respondents for the purpose of having the foreign body removed from

his eye, and the operation performed with that end in view was with his consent.

[14] The doctrine of res ipsa loquitur is not applicable to the facts of this case, and before plaintiff can recover he must show by expert testimony that the defendants failed to use the degree of care and skill ordinarily exercised by other surgeons in this community.

We have carefully examined the record, and find therein no prejudicial errors in the rulings of the trial court in connection with the admission or rejection of evidence. Such rulings were in accord with the law as hereinbefore stated applicable to cases of this character.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.




37 Cal.App.2d 503

**PAYNE et al. v. CALLAHAN et al.**

Civ. 2508.

District Court of Appeal, Fourth District, California.

Feb. 28, 1940.

Hearing Denied April 25, 1940.

**1. Appeal and error ⇐996**

Mere inferences from the dates of various instruments were not sufficient basis for upsetting on appeal a finding that there was no fraud in cancelling lease and making subsequent lease.

**2. Mines and minerals ⇐73**

An oil lease for an indefinite term, or for a term of years and as long thereafter as oil or gas may be found in the land, creates in lessee a "profit a prendre in gross" which in itself is "real property," a freehold interest in land, but a lease for a definite term of years is a "chattel real" and is "personalty," though creating an interest in realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real," "Personalty," "Profit a Prendre in Gross" and "Real Property."

**3. Mines and minerals ⇐47**

The owner of land does not have an absolute title to oil and gas in place as corporeal realty, but rather the exclusive right on his premises to drill for oil and gas, and to retain as his property, all substances brought to the surface.

**4. Mines and minerals ⇐74**

An oil lease for an indefinite term, constituting a profit a prendre in gross, is subject to assignment either in whole or in part, and assignment of portion of landowner's royalty conveys an interest in realty constituting a "profit a prendre in gross," and making assignor and assignee tenants in common in the freehold.

**5. Property ⇐11**

The doctrine of potential possession of personalty was abolished by the Uniform Sales Act. Civ.Code, § 1725.

**6. Mines and minerals ⇐79(1)**
**Tenancy in common ⇐3**

Where lessee under oil lease indefinite in its terms, as owner of a profit a prendre in gross, assigns an overriding royalty for the indefinite term of such lease, he conveys a part of his profit a prendre in gross, which is realty and limited in duration to life of the lease, and hence lessee and assignee become cotenants.

**7. Tenancy in common ⇐43, 44**

A tenant in common may dispose of his own undivided share, but may not sell the whole property, nor any portion thereof except his own, and his co-owners are not bound by his attempt to dispose of any larger interest.

**8. Mines and minerals ⇐81**

Where subsequent assignee of overriding royalty of 60 per cent. of the oil produced, created by oil lease indefinite in term, executed quitclaim deed to original lessor, only assignee's interest was conveyed, and owners of fractional parts of the lessee's portion had right, superior to claims of subsequent lessees having constructive notice by recordation, to share in production of hydrocarbons.

**9. Tenancy in common ⇐39**

Lessees who made other persons cotenants with them in their leasehold estate thereby limited their right to terminate the lease by their own quitclaim without consent of assignees, notwithstanding provision in lease conferring such right.

**10. Courts ⇐488(1)**

Arguments seeking re-examination of prior decision of Supreme Court were proper while case was pending in Supreme Court, but became inappropriate after transfer of the case to District Court of Appeal.

**11. Tenancy in common ⇐13**

The lawful possession of one cotenant is the possession of all cotenants.

**12. Tenancy in common ⇐22**

Nonproducing cotenants may share in oil produced by a single cotenant, in view of difference between cotenancy in mineral rights and cotenancy in surface estate.

---

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by W. L. Payne and another against C. B. Callahan and others, to quiet titles to minerals produced in and under realty, for accounting, and for other relief. From a judgment for defendants, plaintiffs appeal.

Reversed.

Hearing denied; GIBSON, J., dissenting.

A. E. Garten and Vern E. Garten, both of Long Beach, for appellants.

Pease & Dolley, Robert M. Pease, Roy P. Dolley, and Adolph H. Levy, all of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment against plaintiffs in an action wherein they sought to quiet their titles to one quarter of one per cent in each, in the hydrocarbons "produced in and under" certain real estate in the Sante Fe Springs Oil District in Los Angeles county; for an accounting, and for other relief not necessary to specify here.

The defendant Callahan is the same person who was the plaintiff Callahan in the case of Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, and the same land and lease are involved in both actions. There is this important difference in the two cases: Defendant Martin in the earlier case claimed and was held to have an interest in the land by virtue of an assignment by the landowner (Gonzales) of a percentage of his royalty reserved in the oil lease, while the plaintiffs here claim an interest in the land by reason of assignments of fractional parts of the lessee's portion of the production from the same property and under the same lease. We will hereafter refer to the royalty to be paid to the landowner and his assignees as the "landowner's royalty" and the percentage to be paid by virtue of an assignment or reservation by the lessee of a portion of the production as "overriding royalty".

On July 28, 1922, Jose Gonzales, by his guardian ad litem, leased the land in question to Roy Sloan, F. E. Glazier and David Stewart Patterson for the purpose of drilling for and recovering hydrocarbons, for a term of twenty years "and so long thereafter as oil, gas, or other hydrocarbon substances are produced thereon in paying quantities". This lease was recorded on August 1, 1922. By assignment, dated July 25, 1922, and recorded August 1, 1922, Sloan, Glazier, Patterson and their wives assigned this lease to C. W. Elliott, reserving to themselves eight and one-third per cent of the production. By an instrument dated July 31, 1922, and recorded August 9, 1922, Elliott assigned to F. B. Whitlow one-half of one per cent "of the gross production of all oil, gas and other hydrocarbon substances produced from the said premises, hereafter described, under the beforementioned original lease, after first deducting the amount of said oil or gas required under the terms of said lease for drilling or pumping operations thereon". Under date of October 12, 1922, recorded October 17, 1922, Whitlow and wife did "sell, transfer, assign, set over and deliver unto W. L. Payne all my right, title and interest in and to one-fourth of one per cent (¼ of 1%) of the gross production of all oil, gas and other hydrocarbon substances produced from the premises hereinbefore described under the terms of the beforementioned original lease". By another assignment, similar in terms, date and date of recordation, Whitlow and his wife assigned a like interest to W. R. Clements.

Under date of September 22, 1922, recorded October 6, 1922, Elliott quitclaimed all of his right, title and interest in the leased land and assigned the lease to E. L. Petitfils who, with his wife, under date of September 25, 1922, recorded October 6, 1922, assigned the lease to United States Royalties Company, reserving to themselves an overriding royalty and also reserving other specified overriding royalties including the one-half of one per cent assigned to Whitlow.

The United States Royalties Company drilled a well on the property which produced oil until about June 10, 1929.

On May 29, 1929, Gonzales and wife conveyed the property to John F. Tracey, "subject to conditions, restrictions, reservations, easements, rights and rights of way of record", and on June 6, 1929, Tracey conveyed the property to C. B. Callahan subject to "'conditions, restrictions, reservations, rights, rights of way and easements of record".

By a quitclaim deed dated May 28, 1929, and recorded June 19, 1929, the United States Oil & Royalties Company (the name of the United States Royalties Company had been changed) quitclaimed the leased property to Gonzales and wife. Other instruments were executed by Callahan and the United States Oil & Royalties Company at about the same time which require no mention here.

Under date of July 11, 1929, Callahan executed an oil lease to the Third Twin Bell Syndicate for a term of twenty years "and so long thereafter as oil or gas can be produced on the leased premises in paying quantities". This lessee drilled a well on the leased land which was brought into production. Plaintiffs claim a percentage of the production of this second well, drilled under the second lease, by virtue of the assignments made while the first lease was in force. They were paid their full proportion of the production from the first well.

Upon these facts the trial court rendered judgment for defendants and this appeal followed.

[1] The trial court found there was no fraud in the cancellation of the first lease and in the making of the second. This finding is conclusive here as there is no evidence of any fraud except such inferences as might be drawn from the dates of the various instruments executed and recorded in 1929. To upset such a finding on appeal there should be more satisfactory evidence of fraud than such mere inferences.

Up to the time of the decision of the case of Callahan v. Martin, supra, there was much uncertainty in this state on the question of the exact interest which the lessee in an oil lease acquired in the leased property. In Brookshire Oil Co. v. Casmalia etc. Co., 156 Cal. 211, 103 P. 927, 928, it was held that such a lease "does not vest in the so-called lessees any present title in the land. It grants only the right to do certain things thereon and to take certain mineral substances therefrom, and no title to such substances passes from the original owner until the same is severed from the realty. In regard to such agreements it is said: 'The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.' Venture Oil Co. v. Fretts, 152 Pa. 451, 460, 25 A. 732 * * *." This rule, with slight variations, was followed in several cases.

[2] In Callahan v. Martin, supra, it was held for the first time that in California an oil lease for an indefinite term, that is, for a term of years and as long thereafter as oil or gas may be found in the leased land, created in the lessee a profit a prendre in gross which in itself is real property, a freehold interest in lands; that a lease for a definite term of years is a chattel real and while creating an interest in real property, is personal property.

[3] The Callahan case rejected what has been called the oil in place doctrine which prevails in several oil producing states. Because oil possessed a "fugacious, vagrant nature" it was held that "the owner of land does not have an absolute title to oil and gas in place as corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land". [3 Cal.2d 110, 43 P.2d 792, 101 A. L.R. 871.]

[4] It was also held that a profit a prendre in gross, a freehold interest, was subject to assignment either in whole or in part and that such assignment conveyed to the assignee an interest in real property that was a freehold estate and a profit a prendre in gross; that the assignor and assignee became tenants in common in the freehold. As the court had before it only an assignment of a portion of the landowner's royalty these statements are only applicable to such assignments by landowners.

[5] It was also held that the doctrine of potential possession of personal property was abolished by the Uniform Sales Act adopted in 1931. Sec. 1725, Civ.Code.

The holdings in Callahan v. Martin, supra, have been followed and applied to various states of facts in the following cases, among others: Standard Oil Co. of California v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237; Dabney v. Edwards, 5 Cal.2d 1, 53 P. 2d 962; Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081; Dougherty v. California Kettleman etc. Inc., 9 Cal.2d 58, 69 P.2d 155; Fairbairn v. Eaton, 6 Cal.App. 2d 264, 43 P.2d 1113; Denio v. Brennecke, 6 Cal.App.2d 678, 45 P.2d 229; George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110; Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035; Morrow v. Coast Land Company, 29 Cal.App.2d 92, 84 P.2d 301; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66; Pimentel v. Hallbaker Co., 32 Cal.App.2d 697, 90 P.2d 588; Sandrini v. Branch, 32 Cal.App.2d 707, 90 P.2d 593; Macklin v. Brittain, Cal. App., 98 P.2d 749. Some of these cases, with others to be later cited and considered, are concerned with overriding royalties created out of the lessee's estate in the leased property.

Interesting comments on the rules announced in these cases, with many citations of additional authorities, are to be found in 25 Cal.Law Review 220; 26 Cal.Law Review 481; 27 Cal.Law Review 192; 9 So. Cal.Law Review 299; and 11 So.Cal.Law Review 319.

It is clear that the rules announced in Callahan v. Martin, supra, are now the settled law in California and that the holding which we have quoted from Brookshire Oil Co. v. Casmalia etc. Co., supra, and adopted in those cases following it, must be considered as overruled.

Some of the cases following Callahan v. Martin, supra, have seemed to assume that because it was there held that the oil in place doctrine did not prevail in California and because it was also held that the landowner did "not have an absolute title to oil and gas in place" but the right to drill "and to retain as his property all substances brought to the surface on his land", the landowner or his lessee had no lawful interest in the oil under the surface, but only a property right in the oil after it was captured and brought to the surface of the ground. Considerable doubt is cast on the correctness of this assumption not only by the above quoted language from Callahan v. Martin, supra, in which it was said that the owner did not have an absolute title to the subterranean oil, but in which it was not held that the owner had no interest in it at all, but also by the several slant drilling cases decided in recent years. See, Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 87 P.2d 1045; People v. Brunwin, 2 Cal.App.2d 287, 37 P.2d 1072; Union Oil Co. v. Mutual Oil Co., 19 Cal.App.2d 409, 65 P.2d 896; Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215; A. E. Bell Corp. v. Bell View Oil Synd., 24 Cal.App.2d 587, 76 P.2d 167.

On proper occasion it may be necessary to further clarify the quoted statements in Callahan v. Martin, supra (sufficient for that case), especially as construed in other cases, by going into greater detail and exactness of definition. It was suggested in 27 California Law Review 192, that the landowner might be held to have a qualified ownership in the subsurface oil. Any such qualified ownership would, of course, be subject to defeasance if the oil left the subsurface of his land either through being drawn off by another well wholly within another's land or by causes which were the result of natural phenomena. Of course, such qualified ownership would ripen into actual ownership if the oil was brought into possession at the surface by the owner or his lessee.

There are several cases which consider the interest or estate of an owner of an overriding royalty. They are not in complete harmony with each other and require our consideration.

The first of these cases is Western Oil etc. Co. v. Venago Oil Corporation, 218 Cal. 733, 24 P.2d 971, 973, 88 A.L.R. 1271. This case involved the rights of overriding royalty owners who acquired their interests prior to 1931 from F. M. Miller, an assignee of the lessee, to participate in the production of an oil well brought to production by the Venago Oil Corporation, a successor to Miller, with notice of the outstanding overriding royalties. The Supreme Court upheld the rights of the overriding royalty owners to receive their shares in the production of the well under the doctrine of potential possession of personal property, and said: "It is settled law that the lessee under an oil and gas lease acquires no title to the oil and gas in place as part of the realty, but only a right to en-

ter upon the land, drill wells, and reduce the oil and gas to possession. When reduced to possession, the oil and gas are personal property, and only then can absolute title vest in the lessee."

The Supreme Court there approved and quoted from the cases of Merrill v. California Pet. Corp., 105 Cal.App. 737, 288 P. 721; Black v. Solano Co., 114 Cal.App. 170, 299 P. 843; and Jones v. Pier, 124 Cal.App. 444, 12 P.2d 646, where similar overriding royalties were held valid and binding obligations of the operating lessees with notice, for similar reasons, namely, the doctrine of the potential possession of personal property.

Of course, these cases are in conflict with the rule of Callahan v. Martin, supra, that the lease creates in the lessee a profit a prendre in gross which is real property. This not only repudiates the prior rule that the lessee acquires no interest in the land and no interest in the subterranean oil or gas, but only the right to drill for it, but also destroys the applicability of the potential possession of personal property theory that formed the basis of numerous prior decisions. However, there is nothing in any of those earlier cases to indicate that any of the courts deciding them would have held any of the overriding royalties void as against an operating lessee with notice, had the Callahan v. Martin rules then been announced. In fact it seems to us that it would have been easier to have upheld the legality of the overriding royalties had it then been the law that the lessee owned a profit a prendre, a portion of the fee which could have been conveyed by the lessee to the purchasers of the overriding royalties. The courts would not have had to invoke the tenuous doctrine of potential possession of personal property because an owner of a portion of the fee can convey portions of his interest to others.

The case of Smith v. Drake, 134 Cal.App. 700, 26 P.2d 313, involved the right of an overriding royalty owner to participate in the production from a well drilled by a subsequent lessee without notice of the claim of the overriding royalty owner. The lease in effect at the time of the creation of the overriding royalty had been quitclaimed by the lessee and a new lease executed to the operator who brought the well to production. The judgment against the owner of the overriding royalty was affirmed. The plaintiffs there asserted that their overriding royalties were interests in land; that the second lessee was in fact a sublessee and that the sublessee had notice of their claims. The appellate court based the affirmance on the holding that the overriding royalty was not an interest in real property, citing Brookshire Oil Co. v. Casmalia etc. Co., supra, Western Oil & Refining Co. v. Venago Oil Corporation, supra, and Black v. Solano Co., supra. It quoted the portion of the Brookshire Oil Company case to which we have already adverted, to the effect that a lessee under an oil lease did not acquire any present interest in the leased land. The Brookshire Oil Company case did not involve the interest of an overriding royalty holder. As it is in conflict with the rule of property established in Callahan v. Martin, supra, the rule relied upon as the foundation for that decision is no longer in force and the case can no longer be considered as sound authority. As the other cited cases based their reasoning on the same discarded rule they cannot now be considered as sound authority. Smith v. Drake, supra, based its holding on the rules announced in the three cited cases, which rules have been repudiated in Callahan v. Martin, supra. It follows that Smith v. Drake, supra, cannot be considered as controlling here since Callahan v. Martin, supra, and the cases following it, have completely destroyed the soundness of its reasoning and in effect disapproved its holding.

Schiffman v. Richfield Oil Co., supra, involved the question of the validity of an overriding royalty against the claim of an operating lessee with notice, which acquired a subsequent interest in the lease. The Supreme Court affirmed a judgment upholding the validity of the overriding royalty. The decision was placed on the broad principles of equity and that court expressly declined to rule on the question of whether or not the overriding royalty holder had acquired an interest in the leased land. It is true that findings to that effect were stricken out. It clearly appears that this was done to carry out the expressed purpose of not ruling on the question of the interest of the overriding royalty owner and not as an expression of any opinion upon it. Therefore, the ultimate decision in that case can afford neither aid nor comfort to either of the parties here.

Dougherty v. California Kettleman etc. Inc., supra, involved an assignment by a licensee or lessee of a portion of his royalty. The validity of the assignment was upheld.

However, the leasehold interest was for a definite term of years and a chattel real, or personal property (Dabney v. Edwards, supra), which destroys the applicability of that decision to the factual situation before us.

Fairbairn v. Eaton, supra, also involved the validity of an overriding royalty. It was there held that such an interest was an estate in real property and enforceable as such.

We have found no California case, other than those already cited, which sufficiently bears on the question before us, to require special consideration. It appears that the only case bearing on the question, decided after Callahan v. Martin, is Fairbairn v. Eaton, supra, in which this court said that an assignment creating an overriding royalty "conveyed an interest in real property to the assignees". However, this holding seems to be more incidental than necessary to the ultimate conclusion there reached.

The question here presented must be considered one of first impression. Decisions in other states are in conflict and are not of sufficient importance to require detailed consideration. This case should be decided under the rules of property announced in Callahan v. Martin, supra, and the numerous cases following it.

It is not out of place to again observe that Callahan v. Martin, supra, dealing with the same property and the identical lease we are here considering, established the following facts which may not be questioned here: (1) The lease vested in the lessees and in their successors a profit a prendre in gross which was an interest in the leased property and was real property; (2) that an assignment of a portion of his landowner's royalty by the lessor (Gonzales) created in his assignee (Martin) a profit a prendre in gross which was not conveyed by a deed of the fee by Gonzales and which was an outstanding estate in the leased property against which Callahan could not quiet his title; (3) that Gonzales and Martin became tenants in common in the land. The conclusion necessarily follows that Tracey and Callahan, Gonzales's successors in interest, were also tenants in common with Martin.

The following questions remain for our decision: (1) Did the assignment by Elliott (successor of the lessees) to Whitlow (plaintiffs' assignor) create a profit a prendre in the land? (2) Did Elliott and Whitlow become tenants in common in the profit a prendre? (3) Could the quitclaim by the United States Oil & Royalties Company, the assignee by mesne conveyances, of sixty per cent of the oil produced, saved and sold from the land, with the interest of Whitlow expressly reserved from the assignment, reconvey to the landowner the entire profit a prendre created by the lease and therefore cancel the lease without the consent of plaintiffs and of the owners of other overriding royalties expressly reserved in the assignment to the United States Royalties Company?

This statement of the issues to be decided injects into the case a question that seems to have been overlooked by the trial court and counsel, namely, that the assignment by Petitfils and wife to the United States Royalties Company did not attempt to assign the entire lessee's interest, but to convey only sixty per cent of the oil produced, saved and sold from the leased premises. This is so obvious that we do not feel justified in overlooking it as it should be considered on a retrial of the case.

The assignment from Petitfils and wife to the United States Royalties Company recites that the Petitfils "transfer, convey and assign all of their right, title, and interest in" the leased land and "in, to and under that certain oil and gas lease upon said real property", describing it, but reserving certain specified overriding royalties. The assignment then proceeds: "It is the intention of the parties hereto that the party of the second part (United States Royalties Company) shall have and receive after the payment of all royalties, sixty per cent (60%) of the oil produced and saved from said land. * * *" The forty per cent royalties reserved from assignment, appear to be the following: Landowners royalty, 16⅔ per cent, overriding royalties; 8⅓ per cent, in original lessees, 1 per cent assigned by Elliott to D. W. Neet, ½ of 1 per cent assigned by Elliott to Whitlow (plaintiffs' assignor), 13½ per cent, subject to possible deductions, reserved to Petitfils.

[6] It should also be observed that the assignment from Gonzales to Martin which was held to create a profit a prendre in Martin (Callahan v. Martin, supra) differs from the assignment of the overriding royalty we are considering in this: The assignment to Martin was not limited to the term of any existing lease while the assignments here were limited to the term of the then existing lease. However, there are

other assignments of landowners' royalties set forth in others of the cited cases which were almost identical with the assignments of the overriding royalties we are considering. Those assignments were held in those other cases to create a profit a prendre in the assignees. The Gonzales lease was for an indefinite period. The assignments, Elliott to Whitlow, and Whitlow to plaintiffs, were for the term of that lease which would, therefore, be for an indefinite period. It follows that because the assignments here were limited to the term of an existing lease which was for an indefinite period, the mere fact that the assignments were so limited to the indefinite term of that lease cannot support the argument that a profit a prendre was not created in the assignees.

If an assignment by a landowner of a portion of his reserved royalty under a lease, for an indefinite term, creates in the assignee a profit a prendre which is a part of the freehold, a similar assignment by the lessee, the owner of the profit a prendre in gross, should create a similar estate in the assignee. Similar conveyances carving estates out of the same property should create like estates. Any other conclusion would be most illogical. We, therefore, conclude that where, as here, the lessee, the owner of a profit a prendre in gross created by an oil lease indefinite in its term, assigns an overriding royalty for the indefinite term of that lease, he conveys to his assignee a part of his profit a prendre in gross which is real property and limited in duration to the life of the lease.

In Merrill v. California Pet. Co., 105 Cal.App. 737, 288 P. 721, it was held that the owner of an overriding royalty became a tenant in common with the lessee. However, that case was decided under the potential existence of personal property theory in vogue before the decision of Callahan v. Martin, supra, which detracts from the weight of its holding.

In Schiffman v. Richfield Oil Co., supra [8 Cal.2d 211, 64 P.2d 1087], the Supreme Court, by way of dicta, expressed the following opinion: "The effect of the above decisions is that an owner of land may create a cotenancy in the right which he has to drill for and produce oil. If the landowner may do this, a lessee to whom the landowner has transferred the exclusive right to drill for and produce oil during the term of the lease, is also in a position to create a cotenancy in the right of profit to produce oil, to continue during the term of the lease. See 25 Cal. Law Review 229."

By analogy, as well as upon well-recognized principles of law, we are impelled to hold that the owner of the overriding royalty here involved, and his successors in interest, became cotenants in the profit a prendre with the lessees and their successors in interest. It is axiomatic that like causes should produce like results. If the assignee of the landowner became a tenant in common with him (Callahan v. Martin, supra, and other cases cited), there should be no escape from the conclusion that the assignee of the lessee and the lessee would become like cotenants. See, also, 7 Cal. Jur. p. 340, et seq., and cases cited.

[7, 8] It is well settled that "a tenant in common property has the right to dispose of his own undivided share, but he may not sell the whole property, nor any portion thereof, except his own, and if he undertakes to dispose of any larger interest his coowners are not bound thereby". 7 Cal. Jur., p. 357. This well-recognized rule was applied in Callahan v. Martin, supra, where it was held that the attempted conveyance of the entire fee by Gonzales did not convey the interest of his cotenant Martin. We therefore conclude that the deed from the United States Oil & Royalties Company to Gonzales only conveyed to that grantee the interest of the grantor in the leased land which was only "sixty per cent (60%) of the oil produced and saved from said land". It could not and did not convey the interests of plaintiffs who were then tenants in common with that grantor.

It follows as a natural consequence from what we have said, that the new lessees, defendants here, excepting Callahan, only acquired such interest in the leased property as their lessor, Callahan, had to give them, the assignments to Whitlow and plaintiffs having been recorded and the new lessees thus having had constructive notice of them. Plaintiffs, therefore, are entitled to share in the present production of hydrocarbons from the leased property.

[9] Defendants argue that as the assignments to plaintiffs were only for the term of the original lease and as that lease gave to the lessees the right to quitclaim the leased property, the interests of plaintiffs fell with the quitclaim of the leased property by the operating lessee. At the time the lease was executed, if the lessees

had assigned no overriding royalties to others, their right to quitclaim and surrender the leased property could not then be questioned. When they voluntarily created others as cotenants with them in the leasehold estate they thereby limited and restricted their right to terminate the lease by their own quitclaim. By operation of law that right became vested in themselves and their cotenants. It could not be exercised by one cotenant any more than by another. Neither could reconvey the estate of the other. It would be just as logical to give to plaintiffs, small fractional owners, the right to quitclaim and terminate the lease without the consent of their cotenants as to give the same right to the oil company, the owner of sixty per cent of the production, without the consent of plaintiffs and its other overriding royalty cotenants who seemingly owned 23⅓ per cent of the production. We agree with defendants in their argument that the overriding royalties would not survive the lawful termination of the lease but cannot agree with the premise upon which that argument is based, that the lease was legally terminated.

Defendants urge a re-examination of that portion of the decision of Callahan v. Martin, supra, and other cases following it, holding that the assignee of a portion of the landowner's royalty receives a profit a prendre by virtue of the assignment and becomes a tenant in common in the freehold. They argue that two of the elements essential to the creation of a true profit a prendre in gross are lacking in the case of such assignment and that, therefore, such assignee should not be held to have received such an estate in the leased land by virtue of the assignment. Those missing elements are, possession of the land, and the right to remove hydrocarbons from the land. They argue that there was no intention to give an assignee of a fractional interest in the production the right to possession of sufficient surface of the land for drilling operations, nor the right to drill for and remove hydrocarbons through the soil; that the lease vests those rights in the operating lessee to the exclusion of all others.

[10] The briefs containing the foregoing arguments were filed while this case was pending in the Supreme Court. The request to re-examine the announced rules and the argument supporting such a request were entirely proper while the case was pending in the Supreme Court. They became inappropriate after the transfer of the case to the District Court of Appeal.

[11] These arguments by defendants overlook one of the prominent features of the estate in cotenancy, namely, that the lawful possession of one cotenant is the possession of all cotenants and also the peculiar nature of the cotenancy in oil producing lands. These questions were considered in Dabney-Johnston Oil Corp. v. Walden, supra [4 Cal.2d 637, 52 P.2d 246], where the Supreme Court said:

[12] "The rights of those who are tenants in common in oil rights in land are the subject of annotation in 40 A.L.R. 1400, note appended to Prairie Oil & Gas Co. v. Allen [8 Cir.], 2 F.(2d) 566, 40 A.L.R. 1389, and 91 A.L.R. 205, note appended to Earp v. Mid-Continent Petroleum Corp., 167 Okl. 86, 27 P.(2d) 855, 91 A.L.R. 188. It is there pointed out that in some jurisdictions it is waste for one tenant in common to go upon the land and produce oil without the consent of the other cotenants. But the more generally prevailing rule, as announced in the cases to which the notes are appended, is to the effect that a tenant in common has the right to go upon the lands and produce oil, provided he does not exclude other cotenants, but must account to cotenants for their respective percentages. A tenancy in common is characterized by a single unity, that of possession, or of the right to possession. * * *

"The rule permitting nonproducing cotenants to share in oil produced by a single cotenant is justified by the difference in a cotenancy in mineral rights and such a tenancy in the surface estate. This rule has become well established, as indicated in the annotations to which we have referred. The propriety of the principle was recognized by this court in the early case of McCord v. Oakland Q. M. Co., supra, where the court said, 64 Cal. 134, at page 148, 27 P. 863, 868, 49 Am.Rep. 686: 'But it may be conceded, for the purposes of this decision, that the relation of the tenants in common, under the circumstances disclosed, is sui generis, and their rights peculiar; that while the extraction of ore from the mine by one tenant, who does not exclude his cotenants, is not waste, and the neglect of the latter to enter should be held an assent on their part to the exclusive occupation by the former, yet, because of the effect of the exclusive working by one may be to

exhaust the mineral, and the uncertainty of the prospective value of the property may render it impossible to make a just partition of it, a court of equity should order an accounting; holding that, while it must have been contemplated by the parties that the tenant in occupation should not be held for waste, or prohibited from proceeding with his work by the co-tenants who do not seek to enter, yet it must also have been contemplated that the tenant in occupation should not appropriate to himself the entire profits.'"

As the interests of the plaintiffs created in the land under the original lease were never terminated nor surrendered, and as defendants had constructive notice of those interests through the recordation statutes, it follows that plaintiffs are entitled to participate in the oil and gas produced from the leased premises.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.




**PEOPLE v. WARREN et al. ***

Cr. 3246.

District Court of Appeal, Second District, Division 1, California.

Feb. 29, 1940.

Rehearing Denied March 15, 1940.

Hearing Granted March 30, 1940.

**1. Criminal law ⇐200(1)**

The offense of "first-degree robbery," which requires proof that crime was perpetrated by person armed with a dangerous or deadly weapon, and crime consisting of violation of the Deadly Weapons Act by possession of a weapon capable of being concealed on the person by a person who has been convicted of a felony are distinct crimes and conviction or acquittal of either does not operate as a bar to subsequent prosecution for the other. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 211, 211a, 654, 687, 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "First-Degree Robbery."

**2. Criminal law ⇐200(1)**

The Legislature has power to create two or more offenses which may be committed by a single act, each of which is punishable by itself, and a conviction or acquittal under each statute would be no bar to a conviction under the other, for accused would not be twice in "jeopardy" for one offense. Pen. Code, § 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy."

**3. Criminal law ⇐1030(1)**

An objection raised for first time on appeal cannot be considered.

**4. Criminal law ⇐742(2), 1158(4)**

Whether a witness is an accomplice is to be judged by evidence, and conclusion of jury as to whether a person is an accomplice, when supported by proper evidence is conclusive on reviewing court.

**5. Criminal law ⇐1038(3), 1064(1)**

Reviewing court would not consider whether defendant's conviction for violating Deadly Weapons Act was unsupported by evidence on ground that only testimony supporting conviction was given by an accomplice, where defendant failed to request in trial court an instruction on subject of accomplices and subject was not mentioned in argument on motion for new trial. Gen. Laws 1937, Act 1970, § 2.

**6. Weapons ⇐17(1)**

Under Deadly Weapons Act prohibiting possession of a firearm capable of being concealed on the person, by a person who has been convicted of a felony, possession of such firearm may be continuous and constitute but one offense, especially where information does not charge possession of a firearm on a specific date or on a particular occasion. Gen.Laws 1937, Act 1970, § 2.

**7. Weapons ⇐17(1)**

Where an indictment for carrying a concealed weapon in violation of Deadly Weapons Act charges commission of offense in general terms, state may prove commission of offense at any time within statutory period next preceding finding of indictment, but if an indictment charges a distinct carrying of a concealed weapon on a particular occasion, state is confined to proof of specific offense therein charged. Gen.Laws 1937, Act 1970, § 2.

*For subsequent opinion see 104 P.2d 1024.

**8. Criminal law ⇐678(1)**

In prosecution for violation of Deadly Weapons Act, wherein information charged commission of offense on or about a named date, on basis of proof establishing that offense was committed on named date and on two other dates, defendant was not entitled to an election by prosecution as to which date it intended to rely on. Gen.Laws 1937, Act 1970, § 2.

**9. Criminal law ⇐739(4)**

While question of once in jeopardy and former acquittal is generally one of fact, question becomes one of law when evidence in support thereof is uncontradicted and is insufficient to sustain plea as a matter of law, and in such case it is proper for trial court to instruct jury to find for prosecution on such issue.

**10. Criminal law ⇐739(4)**

In prosecution for violating Deadly Weapons Act, pleas of once in jeopardy and former acquittal, which involved construction by the court of the statute providing for the charging that a defendant was armed at time of commission of prior offense or arrest and application of such statute to Deadly Weapons Act presented a question of law for the trial court, and hence trial court properly instructed jury to find for prosecution on such pleas. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 969c, 1168(2) (b).

**11. Criminal law ⇐655(1)**

Under constitutional provision authorizing comments by trial court to jury in criminal case, such remarks should be temperate and unemotional in tenor, but trial court is not confined to specific comments or to recital of facts, and the right of comment may be exercised in a manner which trial court deems necessary for proper determination of the case. Const. art. 6, § 19.

**12. Criminal law ⇐766**

In prosecution for violation of Deadly Weapons Act, trial court's comments that pleas of once in jeopardy and former acquittal based on conviction of two of the defendants for robbery and of being armed at time of commission of offenses and also at time of their arrest, and acquittal of other defendant on same charges were not available to defendants were not objectionable as an invasion of province of jury. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 211, 211a, 654, 687, 969c, 1168(2) (b); Const. art. 6, § 19.

**13. Criminal law ⇐1186(4)**

In prosecution for violation of Deadly Weapons Act failure to give an instruction on question of accomplices although no request was made therefor was not reversible error where contention that witness on whose testimony conviction of one of the defendants was based was an accomplice was raised for first time on appeal and was not supported by the record. Gen.Laws 1937, Act 1970, § 2; Const. art. 6, § 4½.

WHITE, J., dissenting in part.

---

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Jack Warren, William H. Henry and Bud Lilly were convicted of violating the Deadly Weapons Act, and they appeal.

Affirmed.

Rehearing denied; WHITE, J., dissenting in part, votes for rehearing as to appellant Warren only.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellants were charged by an amended information with violation of section 2 of the so-called "Deadly Weapons Act" (Act 1970, Deering's General Laws, 1937 edition), together with certain prior convictions of felonies. This is an appeal from the judgments of conviction and from the order by which appellants' motions for new trial were denied, the following points being urged as grounds for a reversal of said judgments and order: (1) That appellants have been once in jeopardy; (2) that appellant Warren was formerly acquitted of the charge; (3) that the evidence is insufficient to support the verdict as to appellant Warren; (4) that the court erred in failing to compel an election; (5) that the court erred in instructions given and refused.

The facts which form the basis of the instant cause are as follows: Around the hour of 1 o'clock on the afternoon of January 9, 1939, appellants Henry and Lilly were arrested in apartment No. 201 of an apartment house located at 2030 South Vermont avenue in the city of Los Angeles, at which time the arresting officers found

wrapped in a sweater two guns, People's exhibits 10 and 11, on a shelf in a closet back of a disappearing bed in the living room. Another gun, People's exhibit 9, and shells, were found by the officers in a drawer in this closet. Later in the afternoon appellant Warren was arrested as he was ringing the doorbell of this apartment. In a conversation with the officers, appellant Henry stated that he lived in the apartment; that appellant Lilly had stayed there on the previous night; that the two guns wrapped in the sweater were brought there by appellant Warren and one Kessler and that the gun found in the closet drawer was his (Henry's). Appellant Lilly, in a conversation with the officers, stated that he had put the guns "there" on the previous night; that two of the guns were brought to the apartment by appellant Warren and said Kessler, and that the third gun belonged to appellant Henry.

The trial in the instant cause took place on April 20 and 21, 1939, following the trial of action No. 75205, in which the jury convicted appellants Henry and Lilly of four counts of robbery and with being armed at the time of the commission of the offenses, to-wit: on December 23, 1938, and also at the time of their arrest on January 9, 1939. The jury acquitted appellant Warren on each of the counts with which he was charged in the information in cause No. 75205, and found that he was unarmed at the time of the commission of the offenses as well as at the time of his arrest.

At the instant trial the testimony of one Polonsky relating to the crimes committed on December 23, 1938, of which appellants Henry and Lilly were convicted, as aforesaid, was introduced in evidence to the effect that on said December 23d, appellants Henry and Lilly held him up and robbed him in an apartment at 365 South Cloverdale, said witness identifying People's exhibit 9 as the gun he saw in the hands of appellant Henry at the time of the robbery, and identifying People's exhibit 10 as being similar to the gun he saw in the hands of appellant Lilly at that time. Said witness also testified that he was ordered by appellant Henry to turn his pockets inside out and to turn over his wrist watch while appellant Lilly went into a closet and took the witness' wallet out of his coat. The witness Groom testified that around the middle of December, 1938, appellants visited him at his home, at which time appellants Henry and Warren were in possession of People's exhibits 9 and 10.

Following his arrest on January 9, 1939, appellant Henry stated to officer Tetrick, one of the arresting officers, that before committing the robbery on south Cloverdale, appellants obtained the guns from a man named Cramer with whom they had previously left them. Appellant Lilly told the officers that on the night of December 23, 1938, he was in possession of the nickel-plated gun and appellant Henry was in possession of the blue steel gun. Appellants entered a plea of once in jeopardy and in addition appellant Warren entered a plea of former acquittal, the jury herein returning verdicts for the People on each of said pleas. Certified copies of prior convictions relating to each of the appellants were received in evidence and marked People's exhibits 1, 2, 3 and 4.

The instant prosecution is based upon section 2 of the Deadly Weapons Act, supra, which provides as follows: "On and after the date upon which this act takes effect, no person not a citizen of the United States of America and no person who has been convicted of a felony under the laws of the United States, of the state of California, or any other state * * * shall own or have in his possession or under his custody or control any pistol, revolver or other fire-arm capable of being concealed upon the person. * * * Any person who shall violate the provisions of this section shall be punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year or by fine not exceeding five hundred dollars, or by both fine and imprisonment."

Section 969c of the Penal Code provides: "Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code relating to 'Certain Minimum Penalties' * * * the fact that the defendant was so armed shall be charged in the indictment or information or complaint. This charge shall be added to and be a part of the count or each of the counts of the indictment or information or complaint which charge the offense at the time of the commission of which or at the time of the arrest for which the defendant was armed with a weapon."

With reference to the first point raised in this appeal, i. e., that appellants have been once in jeopardy for the offense charged by the information herein, it is urged that "it was obviously the intention of the legislature in adopting section 969c of the Penal Code to provide for the economy of trials and the consolidation of the issues of being armed with a deadly weapon at the time of the commission of the offense or at the time of arrest and upon the finding affirmatively of the jury thereon to give to the defendant the additional punishment which the law prescribes under such conditions, this being an additional five-year minimum period of imprisonment. (Sec. 1168, sub. (2)(b), of the Pen.Code.) * * *. The defendants in Case No. 75205, Superior Court, were each charged with a prior conviction of felony. Each admitted this prior conviction. * * * The issue of whether they were armed at the time of the commission of the offense on December 23, 1938, was specifically placed before the jury. The jury found specifically that Henry and Lilly were so armed on each occasion and further found that Warren was not so armed. Pursuant to these findings judgments were entered against Henry and Lilly and under the law, each of them, by reason of said findings, must receive a minimum sentence of ten years on each count—or five years additional punishment by reason of their previous conviction of felony, plus five years by reason of being previously convicted of having been armed with a dangerous or deadly weapon at the time of the commission of the offense and at the time of their arrest, * * *. The legislature having seen fit to provide for a single trial to cover both issues herein set forth and the jury having passed on both issues the convicted defendants now facing double long and additional punishments on both issues certainly have been once in jeopardy."

The sections of the Penal Code pertinent to the point here under discussion are as follows:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear". Sec. 211, Pen.Code.

"All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree." Sec. 211a, Pen.Code.

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *" Sec. 654, Pen.Code.

"No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Sec. 687, Pen.Code.

"When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information." Sec. 1023, Pen.Code.

[1] It is true, as contended by appellants, that it was necessary to prove that they were armed when they robbed the witness Polonsky on the night of December 23, 1938, in order to constitute the crime then committed as robbery in the first degree. On the other hand, it is also true that the offense which is prohibited by section 2 of the Deadly Weapons Act, i. e., possession or control of a firearm by persons who had been previously convicted of crime, was complete before the robbery took place for the reason that without possession of the deadly weapons which were used in the perpetration of the robbery, that crime could not have been consummated. The possession of a deadly weapon, which is calculated to provoke assaults or worse, has been made an offense under the Deadly Weapons Act for the very purpose of preventing personal violence, and it is therefore incorrect to say that because robbery in the first degree may result from the possession of a firearm in the hands of an ex-convict, that such possession, as a matter of law, becomes so integral a part of the crime of first degree robbery that the conviction or acquittal thereof is a bar to a subsequent prosecution for the crime of possession of such deadly weapon.

[2] "A single act may be an offense against two statutes; and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. * * * Undoubtedly it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for one offense, but only once in jeopardy for each offense." 15 Am.Jur. p. 67. In the case of People v. Bentley, 77 Cal. 7, 18 P. 799, 11 Am.St.Rep. 225, it was held that a conviction of an assault with a deadly weapon, under an information charging an assault with intent to commit murder, is not a bar to a subsequent conviction of an attempt to commit robbery, although the offenses were so closely connected in point of time that it is impossible to separate the evidence relating to them

In People v. Perry, 99 Cal.App. 90 at page 93, 277 P. 1080, it was held that the crime of carrying a concealed weapon in violation of the Firearms Act (Stats.1923, p. 695) is separate and distinct from the crime of robbery, and defendant was subject to separate indictment, conviction and punishment for carrying a concealed weapon, irrespective of the result of the robbery prosecution, and notwithstanding that both crimes may have grown out of the same continuous transaction and were committed at the same time.

It must therefore be concluded that appellants' first and second points have no merit for the reason that the two offenses herein referred to are separate and distinct crimes and the conviction or acquittal of either does not operate as a bar to the subsequent prosecution for the other.

[3-5] With reference to appellants' third point, it is urged that the evidence is insufficient to sustain the conviction of appellant Warren for the reason that the only testimony in the record which shows that he was in possession, custody or control of a gun was given by the witness Maynard Groom; that said Groom was an accomplice and that there is no corroboration of his testimony. The contention that Maynard Groom was an accomplice is raised for the first time upon this appeal. It is revealed by the record that no instruction on the subject of accomplices was given or requested and neither was the subject mentioned in the argument on motion for new trial. An objection raised for the first time on appeal cannot be considered. People v. Smith, 96 Cal.App. 373, 380, 274 P. 451. Whether a witness is an accomplice is to be judged by the evidence in the case (People v. Howell, 69 Cal.App. 239, 230 P. 991), and the conclusion of the jury as to whether a person is or is not an accomplice, when supported by proper evidence, is conclusive and cannot be disturbed on appeal. People v. Frahm, 107 Cal.App. 253, 265, 290 P. 678.

[6-8] Appellants urge that where the prosecution relies upon more than one act in a series of alleged acts, the defendant is entitled to an election by the prosecution as to which act it intends to rely upon. It is pointed out that the information charges the offense to have been committed on or about the 9th day of January; that after the trial got under way, the prosecution presented as its first evidence the date of December 23, 1938, on which date the robbery of Seymour Polonsky took place; that the testimony of Maynard Groom referred to a different date and that when officer Tetrick took the stand, he testified to the events which transpired on January 9, 1939.

Section 2 of the "Deadly Weapons Act" prohibits the possession, custody or control of a pistol, revolver, or other firearm capable of being concealed upon the person, by a person who has been convicted of a felony. The statute does not provide that it is an offense for each day that the ex-convict is in possession of the weapon, hence such possession may be continuous and constitute but one offense, especially where, as here, the information does not charge the possession on a specific date or on a particular occasion.

"Where an indictment for carrying a concealed weapon charges the commission of the offense in general terms, the state may prove the commission of the offense at any time within the statutory period next preceding the finding of the indictment, but accused will be protected from any prosecution for having carried a concealed weapon about his person within that period. If, however, in an indictment for

carrying a concealed weapon, the descriptive averments are so specific as to charge a distinct carrying of a concealed weapon on a particular occasion, then the state is confined to proof of the specific offense therein charged; and in such a case accused would not be in jeopardy of being convicted for having carried a weapon concealed at another time and under different circumstances." 16 Cor.Jur. 269.

It is therefore obvious that the court did not err in refusing to require the prosecution to elect as to which one of the three dates it intended to rely upon for a conviction.

The appellants finally contend that the court erred in instructions given and refused.

A motion by appellants for diminution of the record herein was granted by this court, and pursuant to an order which was made on January 22, 1940, a supplemental clerk's transcript has been filed containing the amended information in case No. 75205, hereinbefore referred to; as well as a supplemental reporter's transcript containing the comments made, and the oral instructions given, by the court to the jury just prior to the latter's retirement for deliberation in the instant cause.

It is here contended that the following oral instruction was erroneously given by the court to the jury: "It is my opinion and I so instruct you at this time that as to the question of once in jeopardy in this case that said plea is not available to each of the defendants at this time and that there is no merit in that plea at this time and that under my instruction to find on the question of once in jeopardy or former acquittal you should find for the People on each and every one of those charges, and I so admonish you and instruct you at this time; but of course under the law you may render the opposite verdict if you desire. That is your privilege and you are the sole and exclusive judges of the facts and of the weight of the evidence. * * * You are entirely free to exercise your own judgment on any question of fact at issue in this case but as a matter of law I instruct you that in so far as this issue is concerned that I think you should return a verdict for the People on the question of once in jeopardy. * * *

"Mr. Lavine: May I ask the Court to instruct the jury that the comment on the question of jeopardy did not affect the question of guilty or innocent?

"The Court: I think I have fully and fairly completed the instructions to this jury, Mr. Lavine, and I have admonished them and I have so advised them that they are entirely free to exercise their own judgment as to any question of fact submitted to them at this time in this case, and in my opinion they should find for the People on the question of once in jeopardy but they are entirely free to exercise their own judgment on that question; but my opinion is that they should find for the People on that question. The record may so show."

[9, 10] While the question of once in jeopardy and former acquittal is ordinarily one of fact, the "question becomes one of law when the evidence in support thereof is uncontradicted and is insufficient to sustain the plea as a matter of law. When such is the case, it is proper for the trial court to instruct the jury to find for the prosecution upon this issue". 8 Cal.Jur. 286, citing People v. Newell, 192 Cal. 659, 221 P. 622. The pleas of once in jeopardy and former acquittal, which were interposed in the instant cause involved the construction by the court of section 969c of the Penal Code and its application to section 2 of the "Deadly Weapons Act". Necessarily, this was a question of law, therefore, the court properly instructed the jury to find for the prosecution upon such pleas. See, also, People v. Conson, 72 Cal.App. 509, 511, 237 P. 799.

[11] Referring to comments made by the court to a jury in a criminal case which are now authorized by article VI, section 19, of the Constitution of this state, it was said in People v. Eudy, 12 Cal.2d 41, at page 47, 82 P.2d 359, 361: "Although such remarks should be temperate and unemotional in tenor, he is not confined to specific comments. The right may be exercised in the manner which the judge deems 'necessary for the proper determination of the case', and is not confined to a colorless recital of facts. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. Even an expression of his opinion concerning the guilt or innocence of a defendant has been held to be within the scope of comment which may be made, provided the province of the jury is not invaded."

[12] The comments of the trial court in the instant case did not amount to an invasion of the province of the jury.

A careful review of the instructions which were given to the jury conclusively shows that they were fully and fairly informed with regard to the various aspects of the law involved herein, and even though one certain instruction may have been somewhat misleading, as is contended by appellants, it was not so prejudicial as to constitute a miscarriage of justice under section 4½ of article VI of the Constitution. This is also true with respect to the two instructions requested by appellants and which the court refused to give.

[13] Appellants finally contend that it was the duty of the trial court to give such stock instruction on the question of accomplices as is generally asked for, and that its failure to so instruct the jury constitutes error. As has been heretofore pointed out, the contention that Maynard Groom was an accomplice is raised for the first time upon this appeal. Moreover such contention is not supported by the record, consequently, there was no reason for the court to give a stock instruction upon that subject in the face of appellants' failure to request it.

The judgments and order appealed from are affirmed.

I concur: DORAN, J.

WHITE, Justice.

I concur in the judgment affirming the conviction of appellants Henry and Lilly, but I dissent as to the affirmance of the conviction of appellant Warren. The last-named appellant contends that the evidence is insufficient to sustain his conviction for the reason that the only testimony in the record which shows that he was in possession, custody or control of a gun was given by one Maynard Groom; that the latter was an accomplice, and that his testimony is without corroboration. The question involved in the appeal of Warren is simplified by the admission of the attorney general in his brief, which is borne out by the record, that "outside of the statements made by appellants Henry and Lilly to the officers that appellant Warren and Kessler brought two of the guns to the apartment where Henry and Lilly were arrested, which statements were made in the absence of appellant Warren and which the trial court ruled were not to be considered by the jury as evidence against defendant Warren, we find that the only other evidence in the record as to the possession of a gun by appellant Warren is the testimony of Maynard Groom." However, the attorney general contends that the contention that Maynard Groom was an accomplice is presented for the first time on appeal and therefore cannot be considered; and secondly, that the appellant not having requested an instruction from the trial judge on the issue of accomplices, he cannot complain on appeal that such instructions were not given. As to the last-mentioned contention of respondent, I am of the opinion that it cannot be sustained, because, as was said by this court in People v. Heddens, 12 Cal. App.2d 245, 247, 55 P.2d 230, "It is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases, even though they are not proposed or presented in writing by the parties themselves." (Citing cases.)

Whether or not the witness Groom was an accomplice was certainly an issue to be determined by the jury. He was the only witness involving the defendant Warren in the offense. He testified that he was an ex-convict and that he knew appellant Warren while the two of them were in San Quentin Prison. He further testified that the occasion upon which he saw the gun in the possession of Warren was in his own home when there was another gun in the possession of one of the other defendants. It was certainly a question for the jury under appropriate instructions to determine whether the witness Groom was acting in concert with the defendants against whom he testified and whether, admittedly being an ex-convict, he was liable to prosecution for the identical offense charged against the defendants on trial in the cause in which he gave testimony. Such being the case, the court should have instructed the jury as to what constitutes an accomplice, and should have advised them that should they find that the witness Groom was an accomplice his testimony must be corroborated. Had the jury, under proper instructions, found that the witness Groom was an accomplice, then appellant Warren was entitled to an acquittal, because, eliminating from the case the evidence of such witness, there was not in the record any inculpatory evidence whatsoever tending to connect appellant Warren with the offense charged against him.

In my opinion, the judgment and the order as to appellant Warren should be reversed.

37 Cal.App.2d 610

## GULDSTRAND v. JOHNSON, CARVELL & MURPHY.

Civ. 6321.

District Court of Appeal, Third District, California.

March 4, 1940.

**Contracts ⇐194**

Under agreement between plaintiff and corporation to operate plaintiff's business at corporation's plant, where corporation agreed to furnish necessary capital and purchase products covered by agreement in sufficient quantities to obtain the lowest cost price, the word "furnish" meant that corporation agreed to supply or advance money necessary to purchase stock or materials and did not mean that corporation was required to contribute that money without the right to receive credit therefor in semiannual settlements.

See Words and Phrases, Permanent Edition, for all other definitions of "Furnish."

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Suit for an accounting by H. A. Guldstrand against Johnson, Carvell & Murphy. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Anderson & Anderson, of Los Angeles, for appellant.

Roland Rich Woolley and Joseph F. Rank, both of Los Angeles, for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

The plaintiff recovered judgment for $1,739.07 in a suit for an accounting in a business enterprise. From that judgment the defendant has appealed, contending that it was not credited with money advanced by it for the purchase of stock and materials used in conducting the business.

The plaintiff represented certain manufacturers of gummed tape, cloth labels and stamp devices in Los Angeles where he was engaged in the business of preparing and marketing that merchandise. The defendant is a corporation with an established mercantile brokerage business in the same city. The plaintiff had neither the capital nor the business prestige to conduct a successful enterprise of that nature. He desired the benefit of defendant's financial aid, experience, standing, advice, sales department, plant, equipment and organization to carry on his business. For that purpose the plaintiff and defendant entered into a written agreement on June 26, 1928, by the terms of which they were to operate plaintiff's business at the plant of the defendant, as a joint adventure or a limited partnership, for an indefinite period of time. That agreement reads in part:

"Johnson, Carvell & Murphy are to furnish space in their offices for H. A. Guldstrand and any assistants that later on may be necessary; do all bookkeeping and stenographic work, pay all telegraph and telephone bills, postage, stationery and other items incidental to efficient conduct of the business.

"Johnson, Carvell & Murphy further agree to furnish the necessary capital and purchase the products covered by this agreement in sufficient quantities to obtain the lowest cost price, and to furnish storage space for such stock as good judgment dictates should be carried.

"Johnson, Carvell & Murphy will do all billing, collecting, buying and selling with the cooperation of H. A. Guldstrand and the proceeds derived from this business shall be allocated as follows:

"1. A monthly payment to Johnson, Carvell & Murphy of Two Hundred and Fifty Dollars ($250.00).

"2. A monthly auto allowance to H. A. Guldstrand of Sixty Dollars ($60.00).

"3. The remaining gross profits to be credited to a reserve fund and to be divided equally between Johnson, Carvell & Murphy and H. A. Guldstrand on July 1 and January 1st of each year.

"4. H. A. Guldstrand is to be allowed to draw Two Hundred Dollars ($200.00) per month, which amount is to be charged aganist his portion of the reserve fund.

"H. A. Guldstrand agrees to devote his entire time and ability to soliciting the trade on the various items named herein and on any other items that may be added to his department."

The business was continued until January 18, 1934, when it was terminated by mutual consent of the parties. Statements were made and the net proceeds of the business

were divided satisfactorily between the parties semiannually according to the terms of the agreement to January 1, 1933. This appeal does not involve business transactions prior to that date. It is conceded the contract was fulfilled except as to the receipts of 1933.

The court found that the surplus fund of the enterprise, which accumulated during the year of 1933, amounted to $3,951.14, in which sum the respective parties were entitled to participate in equal shares. That figure is not disputed. That amount represents the gross income from the business in 1933, less the aggregate costs of operation. It does not contain a deduction of any part of the money expended by the defendant during that year for purchasing stock and materials for use in the business, which amounted to a total sum of $4,917.96. The entire controversy on appeal is over the question as to whether the defendant is entitled to credit for the money it expended in purchasing necessary stock and materials for the manufacture and sale of the products of the business. The court found that the defendant was required by the provisions of the second paragraph of the contract above quoted to contribute and supply the capital necessary to make all purchases of stock and materials and that it was not entitled to a refund of the money spent for that purpose. The appellant contends that finding is not supported by the evidence. The solution of that question depends solely on a construction of the written contract.

We are of the opinion the findings and judgment are not supported by the evidence. Our interpretation of the language of the contract convinces us that the defendant agreed to merely advance the necessary capital to purchase stock and materials to be used in the business, and that it is entitled to credit on an accounting for such expenditures. The language of that paragraph, sound business principles and the construction placed upon the contract by the parties thereto in all previous semiannual settlements of which we have a record, supports that construction of the agreement. The paragraph in question declares that defendant agrees "to furnish the necessary capital and purchase the products covered by this agreement in sufficient quantities to obtain the lowest cost price, and to furnish storage space for such stock as good judgment dictates should be carried". The word "furnish" as it is used in that paragraph merely means that the defendant agreed to supply or advance the money necessary to purchase the stock or materials for carrying on the business. It does not mean that the defendant is required to contribute that money to the business without the right to receive credit therefor in the semiannual settlements. The paragraph clearly implies that construction, for it reads that the capital will be furnished so that the materials necessary to be used in the business may be purchased "in sufficient quantities to obtain the lowest cost price". If the defendant was to supply that cost money without the right to recover it in subsequent settlements, the plaintiff would not be interested in getting the stock and materials at "the lowest cost price". He would not then care what the defendant paid for the materials. Moreover, it would have been very easy to have provided that the defendant should pay and contribute to the operating of the business all costs and expenses thereof, if that were intended by the parties. The contract clearly indicates that was not the intention of the parties, for the first paragraph above quoted specifies exactly what items of cost and maintenance of the business were to be borne by the defendant. Later the contract provides for the payment to the plaintiff of $60 per month in lieu of his cost of operating an automobile, and that he was permitted to withdraw for his own use from the reserve fund the further sum of $200 each month. These sums were regularly paid to him. It appears that the cost of stock and materials purchased by the defendant amounted to almost one-third of the gross receipts derived from the sales of merchandise. It seems unreasonable to assume that the defendant, with its established prestige, plant and organization, would assume all hazard of losses and agree to contribute to a speculative infant industry everything necessary to conduct the business, together with all cost of machinery, supplies and materials. It is clear that the parties did not so construe the contract. In the last two semiannual statements which were rendered, and upon the basis of which the plaintiff was paid, items for the cost of materials purchased were clearly credited to the defendant. In the statement for the first six months of 1933, the defendant was credited with "cost of goods sold", $2,617.38. The plaintiff failed to complain of that credit to the defendant at the time of the settlement. The

statement of the last six months' period contained a similar credit item of $2,300.58. Statements of the previous four and a half years' business are not included in the record before us. But we assume that it was the custom of the defendant in rendering these semiannual statements to include therein credit for all expenditures of capital for the purchase of stock and materials. At least the last two statements which are in evidence clearly show that the parties construed the contract to mean that the defendant merely advanced the necessary funds with which to purchase the supplies so that they could buy them in large quantities and thereby procure the "lowest cost price", and that the defendant should therefore receive credit and become reimbursed for such expenditures.

Following the preceding construction of the contract, it appears that the plaintiff who was advanced $200 each month from the reserve fund, with which sums he should be charged, is entitled to no further payment from the balance of that fund which is on hand, since the aggregate sum of money expended by the defendant in purchasing stock and materials exceeds the amount remaining in that reserve fund. There is no other money or property on hand.

The judgment is reversed and the court is directed to render judgment against the plaintiff to the effect that he may take nothing by his suit.

We concur: PULLEN, P. J.; TUTTLE, J.




37 Cal.App.2d 627

**PEOPLE v. NEWMAN et al.**

Cr. 3309.

District Court of Appeal, Second District, Division 1, California.

March 5, 1940.

**1. Criminal law ⇐304(1)**

It is common knowledge that the "National Scratch Sheet" is a publication and can be purchased at any news stand.

**2. Criminal law ⇐680(2)**

In prosecution for violating statute making it a felony to record or register bets or wagers upon result of any trial of speed of man or beast, evidence with regard to conversations and statements made by accused was inadmissible, where corpus delicti was not established. Pen.Code, § 337a, subd. 4.

**3. Gaming ⇐93(1)**

In prosecution for violating statute making it a felony to record or register bets or wagers upon the result of any trial of speed of man or beast, evidence failed to establish the corpus delicti. Pen.Code, § 337a, subd. 4.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Joseph Newman and another were convicted of violating a statute declaring it to be a felony to record or register bets or wagers upon the result of any trial of speed of man or beast, and they appeal.

Reversed.

Leland E. Zeman, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellants were accused by information of violating subdivision 4 of section 337a of the Penal Code, which declares it to be a felony to record or register bets or wagers upon the result of any trial of speed of man or beast. A jury trial was duly waived and the issue was submitted, by stipulation, upon the transcript of the testimony adduced at the preliminary hearing.

The defendants were adjudged guilty, whereupon defendant Newman was sentenced to imprisonment in the county jail for the term of one year, and the defendant Martin was sentenced to imprisonment in the county jail for the term of six months.

The appeal is from the judgments, and from the order denying appellants' motions for a new trial. It is urged on appeal that the evidence is insufficient to sustain the judgment.

Certain testimony which reveals the facts is set forth for reasons which will hereinafter appear.

The witness Ginder testified as follows:

"Q. You are a police officer, city of Los Angeles? A. Yes, sir.

"Q. And your name is F. Ginder? A. Yes sir, that is right.

"Q. What division of the police do you serve in? A. Central vice.

"Q. Did you see these defendants on September 8, 1939? A. Yes, sir.

"Q. Where? A. On Winston Street just west of Wall, on the south side of the street.

"Q. Is that a place in the city and county of Los Angeles? A. Yes, sir.

"Q. You say they were in the street? A. On the sidewalk, yes sir.

"Q. On the sidewalk. Were they in front of any number there? A. In front of a garage, I don't recall the number.

"Q. What did you see the defendants doing? A. There was quite a group of men gathered around in front of this garage, and the defendants were both circulating around through these people on the sidewalk and taking money from some of them, making notes in notebooks and giving change.

"Q. You saw that? A. Yes, sir.

"Q. Now did you observe any particular kind of a notebook in the possession of either one of the defendants? A. The defendant Martin was making notes on scratch paper that was already torn out of the notebook, paper about four inches long and two inches wide, ruled paper, and as I approached Martin a man walked up to him and handed him a dollar bill, and he made a notation on a piece of scratch paper and received some change and walked away. As I got a little closer another man approached Martin and said 'I want to bet fifty cents to win', but I did not get the name of the horse. He made another notation on that same piece of scratch paper and gave this man fifty cents change from a dollar bill. Then he handed this piece of scratch paper to the codefendant Newman.

"Q. What did you see Newman do with it, if anything? A. He then went into the garage which they were standing in front of.

"Q. Did you see him approach a telephone? A. No sir, I did not."

The witness Wilkinson testified as follows:

"Q. You are a police officer, city of Los Angeles? A. I am.

"Q. What division of the police do you work in? A. Central vice.

"Q. Did you see these defendants on September 8, 1939? A. I did.

"Q. Where? A. On Winston Street just west of Wall.

"Q. That is a place in the city and county of Los Angeles? A. Yes, sir.

"Q. Did you go down there with Officer Ginder? A. I did.

"Q. And you were working with him at that place? A. Yes sir.

"Q. What did you see the defendant Newman and the defendant Martin doing there? A. Well, there was a group of men scattered along the sidewalk there with betting markers or scratch sheets and race forms, and Newman and Martin were circulating around among them, money would pass hands and change would be made, and I saw Martin pass Newman some slips of paper.

"Q. What color were they? A. They were white sheets of paper.

"Q. I will show you some slips of white paper and ask you if that is the paper you saw Martin pass to Newman? A. That kind of paper, yes.

"Q. Did that paper afterwards come into your possession? A. Officer Armstrong.

"Q. You saw him get possession of that? A. Yes sir.

"Q. Were these papers passed to the defendant Newman in one bunch or at several different times? A. Different times.

"Q. And all of the paper that you saw pass had the appearance of this paper? A. Yes sir.

"Q. Did you see the defendant Newman write anything on this paper? A. No sir.

"Q. Did you hear anything else at this place between the defendant Martin and the defendant Newman? A. No sir—I heard no conversation.

"Q. You did not? A. No sir."

The foregoing is the only evidence of the corpus delicti. It should be noted that that portion of the testimony of Officer Ginder, namely, "but I did not get the name of the horse", is a conclusion and is not evidence.

[1] The defendants were then and there arrested. Upon arrest, slips of paper

with notations thereon were found in their possession and, as well, what is described as a "scratch sheet". The "scratch sheet" referred to was an isssue of the "National Scratch Sheet" which, as a matter of common knowledge, is a publication that can be purchased at any news stand.

The respondent seeks to support the judgment with evidence of conversations and of statements made by the defendants after their arrest.

With regard to the slips of paper found in the possession of the defendants, Officer Ginder testified as follows:

"Q. Can you identify any of those slips as one of the slips Martin was marking on? A. Your Honor, the only way I can identify is that the defendant Martin later on told me that this was the slip I saw him write on."

[2, 3] From the foregoing it is evident that the corpus delicti was not established and hence the evidence with regard to conversations and statements was inadmissible and cannot be considered in support of the judgment. Objections to the introduction of such evidence were made at the trial and overruled. The evidence falls far short of being sufficient to prove the corpus delicti.

For the foregoing reasons the judgments and the order denying the motions for a new trial are, and each of them is, reversed.

We concur: YORK, P. J., WHITE, J.




37 Cal.App.2d 577

**PEOPLE v. GOLDSTEIN.**

Cr. 3298.

District Court of Appeal, Second District, Division 1, California.

March 1, 1940.

**1. Homicide ⇐241**

The rule that, when commission of homicide by defendant has been proved, burden of proving mitigating circumstances or justification or excuse rests upon defendant, does not mean that a defendant charged with murder is bound to establish his defense or facts in mitigation by preponderance of evidence on that issue, but means that defendant must elicit such evidence as will create a reasonable doubt of defendant's guilt of offense charged or of a higher degree of such offense. Pen.Code, § 1105.

**2. Criminal law ⇐254**

In prosecution for murder where jury was waived, trial judge was clothed with power to give such weight as he deemed proper to circumstances surrounding commission of homicide in determining to what extent they operated as mitigating circumstances.

**3. Criminal law ⇐254**

In prosecution for murder where jury was waived, in determining that evidence established that killing was a willful and premeditated act, trial judge could consider quarrel between defendant and deceased on day of homicide and that, when defendant called upon deceased on evening of tragedy defendant had armed himself, and other circumstances respecting quarrels between defendant and deceased.

**4. Homicide ⇐347**

In first-degree murder cases, authority conferred by statute to modify judgment by reducing crime to lesser degree, where evidence warrants, should be exercised only where evidence clearly is insufficient to show crime in greater degree. Pen.Code, § 1181.

**5. Homicide ⇐347**

Judgment finding defendant guilty of first-degree murder could not be disturbed where, under facts, reviewing court did not have a reasonable doubt on issue of legal sufficiency of evidence to sustain judgment. Pen.Code, § 1181.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Max Goldstein was convicted of murder in the first degree, and he appeals.

Affirmed.

Gladys Towles Root, and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county defendant

was charged with the murder of his wife, Dora Dean Goldstein, on June 18, 1939, to which charge he entered a plea of not guilty. After a trial before the court sitting without a jury, defendant was found guilty of murder of the first degree and sentenced to life imprisonment. From the judgment of conviction and from the order denying his motion for a new trial defendant appeals. The sole contention on appeal is that the circumstances surrounding the killing show that the crime was manslaughter or at the most murder of the second degree.

Summarized, the evidence upon which the court based its decision is as follows: The deceased, Mrs. Goldstein, came to the home of a Mrs. Gronoff on June 18, 1939, at about 11 o'clock in the morning, where she stayed all day. Defendant came to the house several times during the day and had conversations with his wife in which he asked her to come home with him, to which requests she replied that she was through with him, that she was waiting for her son to pick up her belongings and that she was leaving him. In the evening defendant returned again to the house, saying to his wife, "Honey, let's make up and forget it. Let's go to a show and have dinner," to which the wife again replied that she was through; and "that was the last time she would ever go with him". About 8:15 or 8:30 of the same evening, according to the witness Mrs. Gronoff, defendant and his wife left the house together, and "a very short time" after they departed, "about five minutes or something like that", the witness heard two shots, and coming out on the front porch found deceased sitting on the steps and the defendant gone.

On cross-examination the witness Mrs. Gronoff testified that defendant had said to his wife, "I can't live without you. Please, come on, let's go to the show." That the wife replied in substance that "she was through with him because he would not let her keep company with her men friends". Defendant was crying and begging and on his knees. That in this conversation he also told her he was some twenty years older than she, and since their marriage they "had gone through every dime they had".

One witness testified that on June 15, 1939, and on other occasions she had heard the defendant say to his wife, "Honey, if anything you do I don't like I will shoot you. I hate to waste bullets because they cost money;" that he said he "didn't care what happened to him; that he would put his arms around her and call her endearing names". Another witness testified that on several occasions she heard defendant tell his wife that if she ever left him he would kill her; that whenever he said that he always started out the statement by calling her darling or some endearing name; that he would tell her he was very much in love with her and life meant nothing without her. A police officer testified that he found the defendant at an oil station near the scene of the shooting shortly after 8:30 p.m.; that the defendant handed him a revolver and said that he had just shot his wife; that he loved her very dearly and had been arguing with her for a day and a half; that she threatened to leave him and he couldn't stand to see her go; that he had spent all of his money since their marriage. It further appeared from the evidence that deceased was about 42 years of age and the defendant 60. The defendant took the stand, but testified only as to his age.

Since the case of People v. Iams, 57 Cal. 115, instructions to juries in murder cases have been approved which advised the jurors that: "The difference between murder of the first degree and murder of the second degree is: that in murder of the first degree the killing must be deliberate and premeditated, while in murder of the second degree the killing is not deliberate and premeditated. In the one case there is a deliberate premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given, to take life. In the other case there is no deliberate, premeditated, preconceived design to kill. In both, however, the killing must have been unlawful and accomplished with malice."

In a well-reasoned and exceptionally well-considered opinion in the case of People v. Wells, 10 Cal.2d 610, 619, 76 P.2d 493, 499, the Supreme Court speaking through Mr. Justice Houser, says: "In order that a conclusion that the offense constituted a murder of the second degree might be sustainable, it should appear with reasonable certainty that immediately preceding the execution of his fatal act the killer had not formed a deliberate intent to take the life of the person whom he thereafter killed, or that such act was not the result of 'pre-existing reflection' or 'deliberate premeditation.' "

[1] Under the provisions of section 1105 of the Penal Code, when the commission of the homicide by the defendant has been proved, "the burden of proving circumstances of mitigation, or that justify or excuse it", rests upon the defendant. This, of course, does not mean that a defendant charged with murder is obliged to establish his defense or "facts in mitigation" by a preponderance of the evidence on that issue, but it does mean that he must elicit, either in the testimony offered by the prosecution or that submitted in his own behalf, such evidence as will create in the minds of the jury, or the trial judge where a jury is waived, a reasonable doubt of his guilt of the offense charged or of his guilt of the higher degree of such offense. People v. Wells, supra. As was said in People v. Rodriguez, 182 Cal. 197, 187 P. 423: "the killing by the defendant being shown, the burden was upon him to explain how it happened that he took a human life and to show any circumstances of mitigation, excuse, or justification for his act that might exist. Unless he met this burden to the extent of raising a reasonable doubt as to his being guilty of murder as distinguished from manslaughter or justifiable homicide, the verdict was justified from the fact alone that he had taken human life".

[2, 3] In the instant case, where a jury was waived, the trial judge was clothed with the power to give such weight as he deemed proper to all the circumstances surrounding the commission of the homicide in determining to what extent if at all they operate as mitigating circumstances in the killing. 6 Cal.Jur. Ten Year Supp., p. 325; People v. Gebbia, 138 Cal.App. 94, 31 P.2d 822. In determining that the evidence established the fact that the killing was the "willful, deliberate and premeditated" act of the defendant, it was within the province of the trial judge to take into consideration the quarrel between defendant and his wife on the day of the homicide when deceased told defendant she was through with him; also the fact that when defendant called upon the deceased on the evening of the tragedy he had armed himself with a loaded revolver; and as well the previously oft-repeated threats to kill her if she left him and his statement, "Honey, if anything you do I don't like I will shoot you. I hate to waste bullets because they cost money;" also defendant's statement to the arresting officer that he had been arguing with deceased over the period of a day or a day and a half and that she threatened to leave him and he "couldn't stand to see her go".

In connection with what we have just said, the Supreme Court in the case of People v. Mahatch, 148 Cal. 200, 203, 82 P. 779, 780, says: "The jury, having found that the only extenuating circumstance which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification, or excuse for the killing being advanced, had a right to infer from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a deliberate purpose on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. If a different one prevailed, secret murders could rarely be punished by the infliction of the highest penalty. It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination. We are satisfied that in the case at bar there was sufficient evidence to warrant the jury, within the rule we have stated, in inferring the existence of a deliberate intent to kill. They so found and awarded the highest penalty, and their finding was approved by the trial judge on the motion for a new trial. This is conclusive upon the subject and upon us, as we can only disturb a finding when we can say, as matter of law, that there was no evidence to support it."

See, also, People v. Rico, 180 Cal. 385, 181 P. 663; People v. McNeer, 14 Cal. App.2d 22, 25, 57 P.2d 1018; People v. Shaver, 7 Cal.2d 586, 61 P.2d 1170; People v. Machuca, 158 Cal. 62, 109 P. 886; 13 Cal.Jur., p. 595, and cases there cited.

[4] Further, in connection with appellant's sole argument on appeal that the conviction should be reduced to that of murder of the second degree or manslaughter, it was pointed out in People v. Wells, supra, 10 Cal.2d at page 626, 76 P.2d at page 502, that the authority conferred upon us in that regard by section 1181 of the Penal Code and exercised in the cases of People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L.R. 1385, to modify a judgment of conviction of murder of the first degree by "'reducing the crime' to either murder of the second degree or to that of manslaugh-

ter", should be exercised by us "only where the evidence either clearly is insufficient to show anything other than that the defendant therein unlawfully killed 'a human being (presumptively) with malice aforethought,' that is wilfully, deliberately and premeditatively, or, possibly, that with respect to whether such a condition in the mind of the defendant existed, as was indirectly suggested in the latter case," (People v. Howard, supra) "when this court entertains 'a doubt as to its (the evidence) showing murder of the first degree.'"

[5] Under the facts of the case now before us this court does not have a reasonable "doubt" on the issue of the legal sufficiency of the evidence to sustain the decision of the trial judge finding the defendant guilty of murder of the first degree, and we cannot therefore disturb such decision.

For the foregoing reasons the judgment and the order appealed from are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.




37 Cal.App.2d 603

**PEOPLE v. STUHLMILLER et al.**

Cr. 3283.

District Court of Appeal, Second District, Division 2, California.

March 4, 1940.

**1. Criminal law ⇐998, 1147**

A motion to vacate judgment of conviction on ground that plea of guilty was induced by threats and promises of leniency is directed to trial court's sound discretion, and reviewing court may not disturb trial court's order, in absence of abuse of discretion.

**2. Criminal law ⇐274, 998**

Evidence in support of motion to vacate judgment of conviction and to permit entry of plea of not guilty on ground of threats and promises of leniency inducing plea of guilty *held* not to show abuse of discretion in denying such motion.

**3. Criminal law ⇐1116**

Where the first matter appearing in clerk's transcript was amended information, followed by subsequent proceedings, and appellant did not request that original information be set forth in record, and record did not affirmatively show whether permission to file amended information had been formally given, appellant could not complain of alleged error in filing of amended information without consent of court, in view of appellant's duty to supply a record showing any prejudicial error.

**4. Indictment and Information ⇐161(1)**

After withdrawal of plea of guilty, and until entry of another plea, district attorney had right to file amended information without leave of court. Pen.Code, § 1008.

**5. Criminal law ⇐1167(4)**

If amended information was filed without leave of court before defendant withdrew plea of not guilty to original information, defendant could suffer no prejudice because of his arraignment on the instrument then on file instead of on a similar instrument bearing a later filing date. Pen.Code, § 1008.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Clifford Neal Stuhlmiller, Jr., was convicted of murder in the first degree, and he appeals from an order denying motion to vacate judgment of conviction to permit entry of plea of not guilty.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

In an amended information appellant was accused of the crime of robbery with the further charge that at the time of the commission of the offense he was armed with a deadly weapon. He entered a plea of guilty to the charge of robbery but denied that he was armed with a deadly weapon. At a hearing conducted June 27, 1939, the court found that appellant was armed as charged in the information and that the crime was robbery in the first degree. Appellant was thereupon sentenced to the penitentiary. On August 18, 1939, appellant presented a motion to vacate the judg-

ment and to permit him to enter a plea of not guilty upon the ground that the plea previously entered was not free and voluntary but was induced by threats and promises of leniency on the part of the arresting officers. He made the motion upon the further ground that the amended information had been filed without an order of court permitting it to be filed. The present appeal is taken from the order denying this motion.

Appellant's contention that his plea of guilty had been induced by threats and promises of leniency is based upon his own affidavit in which he outlines certain statements alleged to have been made by the arresting officers. To offset the statements contained in appellant's affidavit the prosecution presented affidavits by three police officers in which the officers denied they had made the statements set forth in appellant's affidavit. Early in the proceedings appellant entered a plea of not guilty and later obtained permission of the court to withdraw such plea and enter a plea of guilty. At that time the court carefully examined appellant, who then stated that the plea was entered voluntarily and that no promises of leniency had been given.

[1, 2] A motion to vacate a judgment upon the grounds relied upon by appellant is directed to the sound discretion of the trial court and a reviewing court may not disturb the order of the trial court unless there has been an abuse of discretion. People v. Toledo, 111 Cal.App. 204, 295 P. 353. No abuse of discretion has been shown in the present case.

[3-5] Appellant is not in position to complain of the alleged error in the proceedings in the filing of the amended information without the consent of the court. The first matter appearing in the clerk's transcript is the amended information, followed by the proceedings taking place after it was filed. Appellant did not request that the original information be set forth in the record, and it does not affirmatively appear from the record whether permission to file the amended information had been formally given. It was appellant's duty to supply this court with a record which would show prejudicial error if any in fact existed. This he has failed to do. Moreover, at the time appellant entered his plea to the amended information the plea which he had entered to the original information had been withdrawn with the consent of the court. It is provided in section 1008 of the Penal Code that an "information may be amended by the district attorney without leave of court, at any time before the defendant pleads". Since appellant had withdrawn the plea earlier entered the district attorney had the right to file an amended information without leave of court at any time after the withdrawal of such plea and until the entry of another plea. Even if the amended information had been filed without leave of court and before appellant had withdrawn his plea of not guilty to the original information, it is manifest that appellant could suffer no prejudice because of his arraignment on the instrument then on file instead of on a similar instrument bearing a later filing date.

The order is affirmed.

We concur: MOORE, P. J.; McCOMB, J.




## HOLLYWOOD MOTION PICTURE EQUIPMENT CO., Limited, v. FURER. *

Civ. 6337.

District Court of Appeal, Third District, California.

March 1, 1940.

Hearing Granted April 29, 1940.

1. Courts ⇐92

The "dictum" is a statement in an opinion not necessary to the decision of the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum."

2. Frauds, statute of ⇐44(1)

An oral agreement, upon plaintiff's delivering patterns to defendant for manufacture of castings, that defendant would not make any castings therefrom other than those ordered by plaintiff, was from its nature not to be performed within a year, and was void under statute of frauds. Civ.Code, § 1624, subd. 1.

3. Sales ⇐52(5)

In suit to enjoin manufacturer from selling castings made from patterns furnished by plaintiff and for damages, wherein manu-



*For subsequent opinion see 105 P.2d 299.

facturer filed a counterclaim for purchase price of articles allegedly manufactured for plaintiff, evidence supported judgment for manufacturer on his counterclaim for entire amount, as against plaintiff's contention that it did not order a portion of articles.

4. Sales ⇐384(6)

Where testimony, though conflicting, would support a finding that buyer ordered articles to be manufactured for it, and that buyer refused to accept articles, trial court properly allowed manufacturer to recover contract price, rather than limiting measure of damages to difference between contract price and the market or current price at the time or times when the goods ought to have been accepted. Civ.Code, § 1725, subd. (3); § 1783, subd. (1); § 1784, subd. (3).

---

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by the Hollywood Motion Picture Equipment Company, Limited, against A. J. Furer, individually and doing business under the firm name and style of the Acme Tool & Manufacturing Company, to enjoin defendant from selling certain castings made by defendant from patterns furnished to defendant by plaintiff, for an accounting and for damages, wherein defendant filed a counterclaim. From a judgment for the defendant on both the complaint and the counterclaim, the plaintiff appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

William Jennings Bryan, Jr., and Harry C. Cogen, both of Los Angeles, for respondent.

Mr. Presiding Justice TUTTLE delivered the opinion of the court.

This is an appeal from a judgment rendered in favor of defendant after the trial court had sustained an objection to the introduction of any testimony upon the ground that the complaint failed to state a cause of action. The judgment further provided that defendant recover the sum of $822.75 on his counterclaim for articles manufactured for appellant. Of this amount, only $132.75 is questioned on this appeal.

The complaint alleges that in 1932, plaintiff invented and developed certain mechanical devices for use in the production of moving pictures; that during the month of December, 1932, plaintiff delivered to defendant certain patterns for the manufacture of one of said devices; that prior to the delivery of said patterns, "and as a condition precedent thereto, said defendants agreed that they would only make therefrom such castings as were ordered by the plaintiff, and that they would not make any castings therefrom other than those ordered by the plaintiff"; that at all times during the years 1933 and 1934, defendant made and finished said castings from plaintiff's patterns as aforesaid, for the sum of $25 a set; that plaintiff thereupon refinished and assembled said castings and sold same to the retail trade for the sum of $100 a set; that during the time said patterns were in the possession of defendant, the latter manufactured and sold to the retail trade a number of castings made from said patterns, in violation of his agreement, and circularized the trade to secure orders for said castings, and that he stated to the trade that he (defendant) would sell such castings at a price much less than that established by plaintiff; that plaintiff was thereby damaged in the sum of $5,000. The prayer asks the court to enjoin defendant from selling said castings; that an accounting be had; and that damages be awarded. It was conceded, when the question was presented to the trial court, that the entire agreement was oral.

[1, 2] It is contended that the complaint does not state a cause of action, for the reason that the right of action is predicated upon an oral contract which is invalid because it is within the statute of frauds, which declares invalid "an agreement that by its terms is not to be performed within a year from the making thereof". Subd. 1, sec. 1624, Civ. Code.

Precisely, respondent contends that the agreement does not specify the time of performance, and that it must be construed to mean that defendant would never, at any time, make any of the inventions for any person other than defendant. In other words, a contract to refrain from doing something, and with no time limitation for performance is of such a nature as to necessarily require more than a year for its performance. The rule in this state is laid down in the case of Long v. Cramer Meat & Packing Co., 155 Cal. 402-406, 101 P. 297. In that case the parties agreed that "under no circumstances would any sheep ever be allowed to range, graze, pasture, or water" upon their ranch. This was an

agreement to refrain from doing a certain act, with no time for performance fixed. The court holds that such agreement could not be enforced for two reasons—first, that it was not a covenant running with the land, and hence was not a personal covenant binding upon the grantee of one of the parties who made the agreement; and second, the agreement was by its nature not to be performed within a year, and therefore was within the statute of frauds. It is urged by appellant that the latter rule was dictum, and that it should be disregarded. We cannot agree with that view. The court gave two reasons for its final conclusions. Each was equally necessary to the disposition of the contentions made. A dictum is "a statement in an opinion not necessary to the decision of the case". 15 C.J. p. 950 § 6. We are of the opinion that what was said with reference to the statute of frauds was necessary to the decision of the case, and that the agreement in the instant case, being substantially the same in purport and effect, must be held invalid.

The cases cited by appellant where certain oral agreements are held not to be within the statute of frauds are all predicated upon the fact that by the terms of such agreements performance within a year was not impossible. None of them involves an oral agreement to refrain from doing some act for all time. Where such agreement is, in effect, to continue forever, a different rule is applied, for it cannot be said that performance within a year is a possibility. Such is the ruling in the Long case, where the nature of the contract showed that it was not intended that it should be performed within a year. We agree with appellant that there is considerable authority on the other side of this question, but the rule in California has definitely been fixed in the Long case.

[3, 4] Defendant filed a counterclaim for $822.75, based upon articles manufactured for plaintiff. The court gave judgment for that amount, and plaintiff now contends that the evidence fails to show that he ordered a portion of said articles—nine speed controls—for which the court allowed $132.75 in the judgment. The balance of the judgment is not questioned. We are satisfied that the evidence is sufficient on this point. It is urged that the court erred in allowing a recovery of the contract price, and that the measure of damages should be "the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted". Civ. Code, sec. 1784, subd. (3). The testimony, although conflicting, would support a finding to the effect that the articles were ordered by plaintiff. It further appears that plaintiff refused to accept them. We believe that the evidence brings the case within the provisions of section 1725, subdivision (3) of the Civil Code, which reads as follows: "Where the parties purport to effect a * * * sale of future goods, the agreement operates as a contract to sell the goods and as soon as the seller acquires the goods the property therein shall pass to the buyer without further act if the parties so intend unless the agreement otherwise provides."

The title passed to plaintiff, the buyer, and the seller was therefore entitled to recover the agreed price of the articles under the provisions of section 1783, subdivision (1) of the Civil Code, which reads as follows: "Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.




37 Cal.App.2d 631

## PEOPLE v. STANHOPE.

Cr. 3313.

District Court of Appeal, Second District, Division 1, California.

March 6, 1940.

1. Criminal law ⇐1144(13)

On appeal from judgment on guilty verdict, appellate court must consider evidence most favorable to prosecution.

2. Criminal law ⇐1159(1)

The appellate court cannot substitute its judgment on facts for that of jury.

3. Criminal law ⇐1160

Where there is evidence tending to support jury's verdict of guilty, appellate court

cannot disturb it as not sustained by evidence, especially where trial court refused new trial.

**4. Criminal law ⇐741(1)**

The weight of evidence is question for jury.

**5. Criminal law ⇐1159(2, 4)**

The jury's and trial judge's findings as to witnesses' credibility and weight of evidence are conclusive on appellate court.

**6. Witnesses ⇐282½**

In theft trial, court properly sustained objections to questions on complaining witness' cross-examination concerning trip claimed to have been made by her to certain city with defendant, where she emphatically denied ever going to such city with defendant before any objections were interposed.

**7. Criminal law ⇐1170½(5)**

In theft trial, defendant was not prejudiced by court's rulings sustaining objections to questions on complaining witness' cross-examination concerning discussions of marriage between her and defendant, where defendant testified fully as to conversations wherein he claimed that such witness urged him to marry her.

**8. Criminal law ⇐1170(3)**

Exclusion of evidence subsequently admitted is harmless, even if erroneous.

**9. Embezzlement ⇐44(3)**

In trial for grand theft, complaining witness' testimony that she entrusted defendant with $250, which he failed to deposit in bank for her as requested or to return, did not preclude his conviction of petty theft, instead of conviction for grand theft or acquittal, where such witness' daughter, who witnessed transaction, testified that amount in question was either $250 or $200. Pen. Code, §§ 487, 488.

**10. Criminal law ⇐1175**

In trial for grand theft, error, if any, in jury's resolution of doubt, raised by conflicting evidence, as to whether amount of money stolen was $250 or $200, in favor of smaller sum and return of verdict finding defendant guilty of petty theft, was error of which he could not complain on appeal. Pen.Code, §§ 487, 488.

**11. Criminal law ⇐655(6)**

In trial for grand theft, trial court's statement in instructing jury that if they believed or found beyond reasonable doubt that complaining witness delivered stated sum of money to defendant and found that money was not deposited in bank, as witness requested, defendant was guilty as charged, amounted to nothing more than fair and general comment, which violated no rights of defendant. Const. art. 6, § 19.

---

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Lawrence Stanhope was convicted of petty theft, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was charged in an information with the crime of grand theft for the unlawful taking of $250, the property of a Mrs. Barlow, to which accusation he entered a plea of not guilty, was tried before a jury, and convicted of the lesser offense of petty theft. His motion for a new trial having been denied and probation granted, the defendant appeals from the order denying him a new trial.

[1] Stating the evidence most favorable to the prosecution, as we are required to do following a guilty verdict, we find in the record the following: For several months prior to May 30, 1939, the date of the alleged theft, defendant had resided at the rooming house of Mrs. Barlow, the complaining witness, in the city of Pasadena. According to the testimony of the complaining witness, on the morning of May 30, at about 11 o'clock, she gave to defendant $250 in cash and a check for $142.46 to be deposited in the bank. Earlier that morning the complaining witness had engaged in a conversation with defendant in which he asked for the use of her car to go to Hollywood, which she granted on condition he return the car by 6 or 6:30 that evening, and in which conversation she also asked him if he would make a bank deposit for her while he was out, which he said he would. Defendant returned from Hollywood about 8:30 in the evening and drove Mrs. Barlow to Monrovia to see a Mrs. Tinsley, bringing her back a little after 9. At about 10 o'clock Mrs. Barlow went to defendant's room and knocked on the door,

but defendant was not there. On the following morning Mrs. Barlow received a telephone call from defendant, who said that he was in Los Angeles; that he wanted her to go away, and he would like to have a vacation; that he would like her to have a vacation; that he had her money and wanted to use it for a week. Mrs. Barlow testified she said she could not do that; that she needed the money to pay her bills, whereupon appellant replied that he would call back at 5 in the afternoon and tell her where to get the money; that he was not coming back to Pasadena. Mrs. Barlow then telephoned a Mr. Van Huel, a friend of defendant, and went to Santa Monica, where she met Mr. Van Huel and defendant on the pier, and demanded her money. Defendant said he would not settle in the presence of Mr. Van Huel, and at defendant's suggestion he and Mrs. Barlow drove away, and while driving the defendant said he had the money in Los Angeles in his room and it would take quite a while to get it; that he expected to have a "good day" on the gambling boat; that he did not have her money with him; and if the witness would go back with him then when he got off the boat he would get the money and bring it to the witness. The defendant then got out of the car and the witness did not see him again until he was brought into court.

The testimony of Mrs. Barlow was corroborated by her daughter, who testified that she was in the room where her mother was counting the money and that she saw her mother give the defendant some money and a check; that she counted out the money; that it was $200 or $250. The records of the bank showed that the deposit had not been made, and Mrs. Barlow testified that defendant never returned the money to her.

Defendant took the stand in his own behalf and testified in general that he roomed in the apartment house maintained by the complainant, Mrs. Barlow; that on February 16 he commenced working for her. He specifically denied receiving the check or the $250 in question or any money from Mrs. Barlow for deposit on the morning of May 30 or any other time. He admitted meeting Mrs. Barlow on the pier at Santa Monica, as testified to by her, at which time the witness Frank Van Huel was present, but denied, as did Mr. Van Huel, that any conversation occurred such as was testified to by Mrs.Barlow concerning $250. Defendant also introduced evidence by other witnesses that Mrs. Barlow had stated to them that she had lost the check which she claimed to have given defendant at the time she allegedly entrusted him with the $250 in cash.

As a first ground of appeal it is urged that the verdict is contrary to the law and the evidence. In support of this contention appellant asserts that the prosecution depended entirely upon the testimony of the complaining witness, Mrs. Barlow, and the latter's daughter, both of whom it is asserted were thoroughly impeached. It cannot be denied that the record here indicates several inconsistencies in the testimony of Mrs. Barlow as well as contradictions of her testimony by witnesses who gave evidence at variance with her narrative of what occurred upon stated occasions. There is also some degree of uncertainty attached to the testimony of the complainant's daughter, who was not sure whether the amount entrusted to appellant was $200 or $250, although she said she was present and saw her mother count out the money. We are, however, confronted with the constitutional provision that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Obviously, reviewing judges are in no position to determine the credit which should be accorded witnesses or to weigh their testimony. In accordance with the constitutional mandate the legislature has clothed the jury with the exclusive right to judge of the credibility of witnesses. Code Civ.Proc., sec. 1847.

[2-5] While the variances and inconsistencies apparent in Mrs. Barlow's testimony and that of her daughter without doubt, afforded opportunity for a persuasive argument to the jury against the reliability of their testimony, and even though, relying solely upon the printed record, we might question such reliability, nevertheless we cannot substitute our judgment on the facts for that of the jury. As was said in People v. Tedesco, 1 Cal.2d 211, at page 219, 34 P.2d 467, 470, "This court has uniformly held that where there is evidence tending to support a verdict we cannot disturb the verdict upon the ground that it is not sustained by the evidence;

and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial. It is settled beyond controversy that the weight to be accorded the evidence is a question for the jury. People v. Ellis, 188 Cal. 682, 688, 206 P. 753." The findings of the jury and the trial judge on the subject of the credibility of witnesses and the weight to be given evidence are conclusive upon this court.

[6-8] It is next contended by appellant that the court erred in sustaining objections to questions asked during the cross-examination of the complainant concerning a trip allegedly made by her in company with appellant to San Diego, and also in sustaining objections to questions concerning discussions of marriage between complainant and appellant. As to the first line of inquiry, the ruling thereon was proper for the reason that before any objections were interposed the complainant emphatically denied ever going to San Diego with appellant and with equal vigor denied registering at a hotel with him. As to the other questions, concerning discussions of marriage by the witness with appellant, the latter suffered no prejudice from the adverse rulings thereon, because appellant himself, when called as a witness, testified fully with reference to conversations had with complainant wherein he claimed she urged him to marry her. Following this, Mrs. Barlow was called and denied any such conversations concerning marriage. It is elementary that the exclusion of evidence at one stage of the case, even if erroneous, is harmless if such evidence be subsequently admitted.

[9, 10] Appellant's next contention, that he should have been convicted of grand theft or acquitted, is without merit. While it is true that the complaining witness, Mrs. Barlow, testified she entrusted appellant with $250, there was evidence given by her daughter who witnessed the transaction that the amount of money in question was either $250 or $200. In view of the provisions of section 487 and 488 of the Penal Code, it is at once apparent that the jury resolved the doubt concerning the amount of money involved in appellant's favor and found him guilty of petty theft. If this was error, it was certainly error of which appellant cannot complain.

[11] Finally appellant predicates error upon certain remarks made by the trial judge when he instructed the jury. The remarks complained of are as follows: "* * * So there is the simple case for you right in a nutshell: Do you believe, or do you find, beyond a reasonable doubt, that Mrs. Barlow delivered to this defendant approximately $250? If you do, and you find that the money was not deposited, then the defendant is guilty as charged. * * *"

The court fairly and correctly instructed the jury with reference to all issues raised by the pleadings or produced by the evidence. He thoroughly defined the difference between grand and petty theft and admonished the jury as to the elements necessary to be proved beyond a reasonable doubt before appellant could be convicted of either offense. Finally, the court advised the jury in unequivocal language that it was within their exclusive province to determine the facts of the case and to consider the evidence for that purpose, and in this connection said: "The Court cannot determine the facts for you, but may aid you by two methods: First, by giving you the rules of law to be used by you in arriving at the truth; second, by, at times, commenting upon the evidence within proper limitations." Taken as a whole, the statement made by the court about which appellant complains amounts to nothing more than fair and general comment which a trial judge is now authorized to make. Art. VI, sec. 19, Calif.Const. The comment of the trial court herein complained of was not contentious in character, nor did the court thereby attempt at any time to direct the return of a particular verdict. The defendant's rights were not in any way violated. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211.

For the reasons herein stated, the order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

## PARSONS v. LOS ANGELES COUNTY et al.

Civ. 2510.

District Court of Appeal, Fourth District, California.

March 7, 1940.

Hearing Denied May 6, 1940.

1. Officers ⇐7

In absence of restrictive provisions, the power of appointment carries with it the power of removal.

2. Officers ⇐71

The provision of the Los Angeles county charter giving the Civil Service Commission power to discharge an inefficient employee independent of the appointing officer does not purport nor intend to deprive an appointing officer of his right to discharge if he determines that an employee is inefficient, but the plain purpose of the provision is to provide an additional means for ridding the county service of inefficient employees, and it may not reasonably be construed as a device to deprive an appointing officer of his right and duty to discharge an employee considered inefficient. St.1913, p. 1494, § 34(15).

3. Officers ⇐69

Under the Los Angeles county charter, the appointing officer could dismiss from service for inefficiency on his sole discretion a duly classified social case worker with permanent classification under civil service regulations, as against contention that an employee in the civil service should not be discharged by the employer without the filing of specific charges which must be supported and that the charter implies that a hearing must be accorded and an opportunity given the employee to defend. St.1913, p. 1494, § 34.

4. Officers ⇐71

As respects validity of discharge of duly classified social case worker with permanent classification under civil service regulations as laid down in charter and rules of Civil Service Commission of Los Angeles County, appointing officer was not estopped from considering worker's efficiency at time of discharge in November, 1936, merely because he gave her a bare passing efficiency mark, in the previous June. St.1913, p. 1493, § 30 et seq.

5. Officers ⇐66

The failure of a Los Angeles county classified social case worker with permanent classification to show improvement in her work together with charge of consistent weakness in accuracy, excessive number of errors, and lack of adaptability, afforded sufficient and specific grounds for summary dismissal from service where written notice of discharge giving reasons therefor was given to worker and worker filed answer denying charges. St.1913, p. 1493, § 30 et seq.

---

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Ethel Parsons against the County of Los Angeles and others, contesting plaintiff's summary dismissal from service as a duly classified social case worker with permanent classification under civil service regulations. From a judgment sustaining a demurrer to the complaint without leave to plaintiff to amend, plaintiff appeals.

Affirmed.

Hearing denied; CARTER and GIBSON, JJ., dissenting.

Crouch & Crouch, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, J. H. O'Connor, Co. Counsel, and Earl O. Lippold, Deputy Co. Counsel, all of Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiff, Ethel C. Parsons, was a duly classified social case worker with permanent classification under civil service regulations as laid down in the county charter and the rules of the Civil Service Commission of Los Angeles County. She was employed as such in the office of the superintendent of charities, and had been so employed since April, 1933. On the 20th day of November, 1936, she received notice in writing from the defendant Rex Thomson, superintendent of charities, to the effect that, upon the recommendation of her superior officer she, the plaintiff, was suspended from her said position, without pay, to take effect as of the close of business on November 30th, 1936; further, that she was to be permanently discharged from her position and from the county service without further notice, to take effect as of November 30th, 1936. The notice so given the plaintiff further stated that she was being dismissed for the following reasons, to wit: "(1) Your last two efficiency rat-

ings of 86 and 86½ indicate no improvement in your work; (2) Your file indicates consistent weakness in accuracy, and excessive number of errors and lack of adaptability." The notice further stated that the plaintiff may have up to and including November 30th, 1936, in which to file written answer to the charges, if she might so desire, with the office of the superintendent of charities, and that copies should be filed with the Civil Service Commission and the personnel office; also that plaintiff's permanent discharge would become effective on November 30th, 1936, without further notice. The plaintiff filed with her employer, the commission, and the personnel office, an answer to the notice so served upon her, which denied the charges made against her, and asked for a hearing. A hearing was denied her and she was thus summarily dismissed from the service.

The Charter of Los Angeles County, adopted in pursuance of the constitutional authority thereof (Art. XI, sec. 7½ Const.) made certain provisions in article IX thereof, St.1913, p. 1493, with relation to civil service. It comprehended the appointment of a Civil Service Commission and the distinguishing of county officers and employees into what they termed the "unclassified" and the "classified" service. It provided for the appointment of a Civil Service Commission and for the adoption by said commission of rules governing the classified service "which should have the force and effect of law"; and that such board and its members shall make investigations concerning the enforcement of the civil service provisions in the charter and of their rules and the efficiency of its service. It is declared, in section 34 thereof, that such rules should, in part, provide for the classification of all persons in the classified service; for open competitive examinations to test the relative fitness of applicants; for the creation of eligible lists; for the rejection of candidates who fail to comply with the reasonable requirements of the commission; for the appointment of one of the three persons standing highest on the appropriate list; for a period of probation not exceeding six months before appointment or promotion is made complete, during which time a probationer may be discharged; for promotion based upon competitive examination and records of efficiency; for suspensions for not longer than thirty days and for leaves of absence; for discharge or reduction in rank or compensation after appointment; and for appointment of a bureau of efficiency for determining the duties of each position in the classified service, fixing standards of efficiency of employees in the classified service, and giving power to the commission after a hearing to dismiss from the service those who fall below the standard of efficiency established.

Section 37 of article IX of the charter provides that all persons holding positions in the classified service, and who have held such position for six months preceding the time the charter takes effect, are not to be discharged * * * except in accordance with the civil service provisions established by the charter.

Section 39 provides that any elector of the County of Los Angeles may file charges in writing against any person in the classified service.

From time to time, and in pursuance of the mandate of the charter, a number of rules were adopted by the Civil Service Commission. Among them, rule 23 declares that each department is required to report efficiency ratings to the commission. Rule 25 declares that the head of each department must make out individual reports of efficiency to the commission semi-annually covering all permanent employees. Section 2 of rule 25 provides that an efficiency rating of 85 per cent shall be given for "average, reasonably satisfactory work which shall comply with the classifications and standards of efficiency set forth in the bulletin announcing the original examination". The section further declares that if such rating shall continue to fall below 85 per cent for two consecutive periods the Civil Service Commission may demote such employee or dismiss him from the service after first giving him an opportunity to be heard in his own behalf.

On this appeal appellant contends first, that the plain intent of the charter is that an employee in the service is not to be discharged by the employer without the filing of specific charges which must be supported, and that the charter provisions imply that a hearing must be accorded and an opportunity given the employee to defend. Second, that the reasons for the discharge of the appellant are not specifically stated as required by the charter and, therefore, the discharge is void. Third, that when tested in the light of the things alleged in the complaint and tested in the light of the

rules of the Civil Service Commission, the charges of inefficiency are false. Fourth, that the charge made against the appellant amounts to nothing more than a charge of inefficiency and that, under the charter, no one but the Civil Service Commission can discharge for inefficiency, and that a discharge for this reason can only be made after a hearing has been given the employee.

In considering the contentions of appellant, she concedes in her brief that "the District Court of Appeal, in the cases of Cronin v. Civil Service Commission, 71 Cal.App. 633, 236 P. 339, and Ey v. Fitts, 112 Cal.App. 109, 296 P. 327, have ruled against many of the contentions that are made in this brief", but claims that "the decisions of the District Court of Appeal referred to do not constitute sound law". In addition to the above-mentioned cases, in the case of Fee v. Fitts, 108 Cal.App. 551, 291 P. 889, in which a hearing was denied in the Supreme Court, the same contention raised in the instant case that the principal is divested of his general power to remove and discharge deputies and employees whom he considers inefficient, was decided contrary to appellant's argument.

In answer to the first contention, respondent maintains that the record here shows that the appellant was legally and effectively discharged in the manner prescribed by the county charter, and no hearing was required. Article IX, section 34 of the county charter, Stats.1913, p. 1484, 1494, provides in part as follows: "The commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law. * * * The rules shall provide: * * * (13) For discharge or reduction in rank or compensation after appointment or promotion is complete, only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction, specifically stated, and has been allowed a reasonable time to reply thereto in writing. The reasons and the reply must be filed as a record with the commission." The only provision as to the reasons for discharge is contained in section 41, which reads: "No person in the classified service, or seeking admission thereto, shall be appointed, reduced or removed or in any way favored or discriminated against because of his political or religious opinions or affiliations." The Civil Service Commission, pursuant to the charter provision, Art. IX, sec. 34, subd. 13, adopted a rule relating to discharge which was in effect at the time of appellant's discharge and which is identical with the charter provision (civil service rule XX.)

In disposing of appellant's first contention, we find no reason to disturb the holding in Cronin v. Civil Service Commission, supra, 71 Cal.App. at page 641, 236 P. 339, and we will not therefore repeat the reasons set forth. Suffice it to say the Civil Service provisions which permit an appointing officer to discharge a civil service employee on his sole discretion are not uncommon. The courts of this state have frequently passed upon such provisions. In Fonseca v. Goodwin, 4 Cal.App.2d 58, 40 P.2d 570, the court had under consideration a provision of the city charter of San Jose similar to that of the county of Los Angeles with respect to discharge. The city charter provided that a hearing might be held for the purpose of permitting the discharged employee to publicly present his side of the controversy and thus deter arbitrary or capricious removals by the managers. The court stated at page 60 of 4 Cal.App.2d, at page 571 of 40 P.2d, of the opinion: "In this respect the charter is similar to that of the county of Los Angeles which was interpreted in Cronin v. Civil Service Commission * * *. The county charter relating to removals of civil service employees required that the person should be 'presented with the reasons for such discharge' and 'allowed a reasonable time to reply thereto in writing.' Mr. Justice Curtis, speaking for the court, referred to the number of standard works upon the principles of civil service legislation as indicating the trend to extend the power of removal as necessary to the discipline and efficiency of the service, and approving the legislation which checks abuse of this power by requiring written reasons for the removal to be filed with an opportunity given the person removed to put his answers on record. There is very little difference between the provisions of the Los Angeles county charter and that of the city of San Jose. The one permits the person removed to file his reply as a public record with the Civil Service Commission, the other permits him to state his defense at a public hearing. Neither charter provides for nor contemplates a trial upon charges made, and neither requires a judgment of discharge resulting from a trial of charges." See also, Nightingale v. Wil-

liams, 70 Cal.App. 424, 430, 233 P. 807; Cahen v. Wells, 132 Cal. 447, 64 P. 699; Commonwealth v. City of Philadelphia, 273 Pa. 332, 117 A. 180, 182; Shellenberger v. Warburton, 279 Pa. 577, 124 A. 189, 190; McCoach v. City of Philadelphia, 273 Pa. 317, 117 A. 71; City of San Antonio v. Newnam, Tex.Civ.App., 201 S.W. 191; Price v. City of Seattle, 39 Wash. 376, 81 P. 847; O'Dowd v. City of Boston 149 Mass. 443, 21 N.E. 949; Paddock v. Brisbois, 35 Ariz. 214, 276 P. 325.

[1-3] It is a well settled rule of law that where there are no restrictive provisions the power of appointment carries with it the power of removal. Fee v. Fitts, supra. The legislature has ample authority to determine the manner in which city employees may be removed and it has undertaken to fix the procedure to be followed. Subject to the limitations expressly imposed, the proper executive officers may discharge. Subdivision 15 of section 34 of the charter makes provision for and gives to the Commission a power to discharge an inefficient employee independent of the appointing officer. It does not purport nor intend to deprive an appointing officer of *his right* to discharge if *he* determines that the employee is inefficient. The plain purpose of the provision is to provide an additional means for ridding the county service of inefficient employees and it may not reasonably be construed as a device to deprive an appointing officer of his right and duty to discharge an employee if he considers him inefficient. We see no reason to disturb the previous interpretations of the effect of the charter provisions and rules of the Civil Service Commission in relation to this power of the employer to discharge for causes therein specified.

[4, 5] The second and third contentions are that the charges filed are not specifically stated and are in the light of the facts alleged false. Appellant contends that her last two efficiency marks of 86 per cent and 86½ per cent were reasonably satisfactory under the standard of a minimum of 85 per cent fixed by the Bureau of Efficiency, and that accordingly the employer could not therefore determine that the employee was inefficient. The last efficiency rating was made for the semi-annual period ending in June, 1936. The discharge of appellant was made in November, 1936, five months after the period for which she received her last markings. The former efficiency marks of appellant may have been no indication of her efficiency at the time of her discharge in November, even under her own theory. The appellant's efficiency mark in November may have fallen to the vanishing point. Certainly, the appointing officer is not estopped to consider her efficiency at the time of her discharge merely because he gave her a bare passing mark in the previous June. The failure of appellant to show improvement in her work under the circumstances related, together with the charge of consistent weakness in accuracy, excessive number of errors, and lack of adaptability, tested by the reasons for discharge, considered in the case of Ey v. Fitts, supra, affords sufficient and specific grounds for the action taken. See, also, Neuwald v. Brock, 12 Cal.2d 662, 86 P.2d 1047; Cronin v. Civil Service Commission, supra; City of San Antonio v. Newnam, supra; Nightingale v. Williams, supra; Shellenberger v. Warburton, supra; Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047; Board of Education v. Ballou, 21 Cal.App.2d 52, 68 P.2d 389; Fonseca v. Goodwin, supra; and McCoach v. City of Philadelphia, supra, wherein it is said (page 73 of 117 A.): "On the same assumption, all that appellee had the right to under this section, was that the cause assigned be a just one, not religious nor political, and the reasons given in this case are ample, if true, to justify the demotion. Neither the court below nor this court is charged with an inquiry into the truth or falsity of the causes alleged; and since there is no trial to be had, the accused is not entitled to such clear specifications as would otherwise be required."

Lastly, as to the contention of appellant that the charge alleged amounts only to a charge of *inefficiency* and that a discharge for this reason can only be made after a *hearing* has been given the employee, we believe it has already been answered. The charter provision which authorizes the civil service commission to intervene and discharge an inefficient employee who falls below a certain standard, independent of an indulgent appointing officer, does not purport nor intend to divest that appointing officer of his power to discharge an appointee for inefficiency, decreasing efficiency or for any other fault or delinquency which moves his judgment. That charter provision was obviously intended to provide a method for removing an inefficient employee where the department head fails

to do so. Appellant's contention is expressly repudiated in Cronin v. Civil Service Commission, supra. In view of the previous interpretation given to the provisions of the charter and for the foregoing reasons, the discharge of the appellant was made in full compliance with the provisions of the county charter and in accordance with the written statement of reasons assigned, and was final and effective. No cause of action was stated against the respondents. The court was justified in sustaining respondent's demurrer to the complaint without leave to the appellant to amend.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 439

## CHICHESTER v. COMMERCIAL CREDIT CO. et al.

## SAME v. COMMERCIAL CREDIT CO.

Civ. 12400.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1940.

Hearing Denied April 22, 1940.

**1. Chattel mortgages ⇐3**

Under the section of the uniform trust receipts law defining trust receipt transactions, and providing that the security interest of the entruster may be derived from the trustee or from any other person and by pledge or by transfer of title or otherwise, the Legislature intended to include within the general provisions of the law all trust receipt transactions without regard to the source of the entruster's title. Civ.Code, § 3014.

**2. Bankruptcy ⇐188(9)**

Where a statement of trust receipt financing of automobiles by automobile dealer was filed with the Secretary of State in accordance with the uniform trust receipts law and within time limited by law, security interest of finance company which paid purchase price was entitled to be protected by express provisions of law against claims of dealer's creditors or his trustee in bankruptcy. Civ.Code, §§ 3016.3, 3016.4, 3016.9.

**3. Statutes ⇐109**

Under constitutional requirement that only one subject shall be embraced within each act and that the subject shall be expressed in the title of the act, the title need not be a complete catalog of every portion of the act, but it is sufficient if it is a reasonably intelligible reference to the subject embraced in the enactment. Const. art. 4, § 24.

**4. Statutes ⇐212**

It is to be presumed that the Legislature was aware of the existing law, and that when it used the term "trust receipt" it referred to all types of security instruments which had theretofore been classified as trust receipts. St.1935, p. 1930; Const. art. 4, § 24.

**5. Statutes ⇐116**

The uniform trust receipts law is not unconstitutional as purporting to deal with the subject of chattel mortgages as well as with trust receipts, without so indicating in its title, where there is no reference in title or in text to chattel mortgages or any other type of security interest not previously included within the accepted meaning of the words "trust receipt transaction." St. 1935, p. 1930; Civ.Code, § 3014(1) (c); Const. art. 4, § 24.

**6. Chattel mortgages ⇐3**
**Fraudulent conveyances ⇐2**

The uniform trust receipts law does not repeal by implication statutes dealing in general with chattel mortgages and bulk sales, since trust receipts constitute the only type of security interest which is not governed by the same laws that existed before enactment of trust receipts law. Civ.Code, §§ 2920, 2955, 2977, 3012–3016.16, 3440.

**7. Constitutional law ⇐70(3)**

The wisdom of the provisions of the uniform trust receipts law validating a type of trust receipt transaction resembling a chattel mortgage previously held invalid is a matter for legislative not judicial concern. Civ.Code, §§ 3012–3016.16.

**8. Chattel mortgages ⇐3**

The provision of the uniform trust receipts law requiring law to be construed so as to effectuate its general purpose to make uniform the law of the states which enact it has for its purpose the object of unifying the laws of the several states on the same

subject, and the law should not, therefore, be treated as a codification of local laws or commercial customs. Civ.Code, § 3016.14.

**9. Chattel mortgages ⇐3**

The fundamental purpose of the uniform trust receipts law should be considered in the light of the general commercial law of the country as a whole, and the principle of the law should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it. Civ.Code, §§ 3012–3016.16.

**10. Bankruptcy ⇐165(2)**

Where finance company's security interest under trust receipts executed by automobile dealer was paramount to the claims of all other persons including dealer's bankruptcy trustee, and by express provisions of trust receipts automobiles were to be held in trust as company's property and company was given right to repossess them at any time, company's repossession of automobiles within four months before dealer filed his petition in bankruptcy did not constitute a "preference" in violation of the Bankruptcy Act. Civ.Code, §§ 3016.3, 3016.4; Bankr.Act § 60, sub. a, 11 U.S.C.A. § 96, sub. a.

See Words and Phrases, Permanent Edition, for all other definitions of "Preference."

**11. Chattel mortgages ⇐73**

That automobile dealer, concurrently with execution of trust receipts for automobiles which he desired to purchase, executed promissory notes to finance company in the same amounts as the amounts of the trust receipts, did not render transactions invalid. Civ.Code, §§ 3012–3016.16.

---

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Frank M. Chichester, trustee of the estate of William C. Reagan, Incorporated, bankrupt, against the Commercial Credit Company and others to recover damages for the conversion of certain automobiles, wherein Frank M. Chichester, trustee of the estate of William C. Reagan, individually, bankrupt, filed a complaint in intervention against the Commercial Credit Company, which contained in general the same allegations as the original complaint. From a judgment for defendants, plaintiff as original plaintiff and as intervener appeals.

Affirmed.

Harry Ashton and George Appell, both of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff, as trustee of the estate of William C. Reagan, Inc., a corporation, bankrupt, commenced this action to recover damages in the sum of $13,239.52 for the conversion of certain automobiles alleged to have been the property of the bankrupt. The complaint contained three causes of action, the first being the ordinary form of action for conversion, the second an action for damages by reason of the alleged preferential transfer of the automobiles to defendant by the bankrupt contrary to the Bankruptcy Act of the United States, 11 U.S.C.A. § 1 et seq., and the third alleging the transfer to be void because of the failure to comply with the provisions of section 3440 of the Civil Code. In addition, plaintiff, in his capacity as trustee of the estate of William C. Reagan (individually), bankrupt, filed a complaint in intervention which contained in general the same allegations as the original complaint. Trial of the action resulted in a judgment for defendant, from which this appeal has been taken.

The facts out of which this action arose are substantially as follows. William C. Reagan was a retail automobile dealer selling Chrysler and Plymouth automobiles in a suburb of Los Angeles. Prior to July 17, 1937, at which time William C. Reagan individually and William C. Reagan, Inc. a corporation, filed petitions in bankruptcy, defendant and Reagan had had numerous dealings over a period of approximately five years. The only transactions with which we are concerned are those having to do in general with the financing by defendant of the purchase of automobiles which were placed on the floor at Reagan's place of business and sold by the latter. Under the procedure adopted in the purchase of the automobiles in question whenever Reagan wished to obtain Plymouth automobiles, he went to the office of defendant and signed trust receipts for the cars which he desired to purchase, together with promissory notes in the same amounts as the trust receipts. Thereafter, defendant called the Los Angeles office of the Chrysler Corporation and ordered the automobiles delivered to Reagan's place of business. In the case of the purchase of Chrysler auto-

mobiles, Reagan placed the order with the Chrysler Corporation in Detroit, Michigan, and after payment of the purchase price by defendant, the automobiles were shipped to Reagan but the bills of lading were made out to, and sent directly to defendant. After Reagan had signed trust receipts for the automobiles, together with promissory notes in the same amounts as the trust receipts, defendant delivered the bills of lading to Reagan and the latter took delivery of the automobiles. In each instance, the full purchase price of the automobiles, plus freight and other charges, was paid by defendant directly to the Chrysler Corporation. The trust receipts involved were agreements whereby Reagan agreed to hold the designated automobiles in trust for defendant, defendant agreeing that Reagan might sell the automobiles for not less than a minimum price, providing an equal amount of money was immediately delivered to defendant. It was further agreed that defendant could repossess said automobiles at any time. A statement of such trust receipt financing was duly filed with the secretary of state by defendant in accordance with the provisions of section 3016.9 of the Civil Code. Defendant repossessed the automobiles in question on or about July 8, 1937, and thereafter sold them. At that time no part of the amount due under the trust receipts covering the automobiles which are the subject of this action had been paid by Reagan.

At the outset, it should be noted that plaintiff concedes that the bankrupt, William C. Reagan, Inc., a corporation, has no interest in the automobiles in question, which fact is supported by the record, since it appears that defendant dealt with William C. Reagan individually and not with the corporation.

On behalf of plaintiff it is contended that title to the automobiles never vested in defendant and that, in reality, the so-called "trust receipt" transaction between the parties was a chattel mortgage which was void for failure to comply with the provisions of section 3440 of the Civil Code relative to recordation.

No California case has been called to our attention which has passed upon the validity of trust receipt transactions under the Uniform Trust Receipts Law of the state. The trust receipt method of financing retail dealers in automobiles, as well as other types of merchandise, has now come into common usage in this country. So widespread had the practice become by 1933 that during that year the National Conference of Commissioners on Uniform State Laws adopted a so-called "Uniform Trust Receipts Act" which was recommended for adoption by the various state legislatures. With very few changes, this uniform act was adopted by our legislature in 1935 as the "Uniform Trust Receipts Law", which is now found in sections 3012 to 3016.16 of the Civil Code. While the security interest afforded by a trust receipt prior to the enactment of the uniform law was somewhat similar to many other forms of chattel security, it may be distinguished from such transactions as a mortgage, pledge or conditional sale. In the case of a mortgage, a lien is given by the mortgagor to the mortgagee in order to secure the latter for the performance of an obligation by the mortgagor who retains possession of the property. The trust receipt does not conform to a pledge, since in the case of a pledge the security depends upon possession of the goods by the person secured; whereas in the case of a trust receipt, the entruster does not have possession of the goods. In the case of a conditional sale, possession may not ordinarily be retaken until there is a default in the contract; whereas under a trust receipt transaction, possession may be retaken at any time. Other distinguishing features of these various types of security interest under the former law are clearly indicated in the case of In re James, Inc., 2 Cir., 30 F.2d 555.

Prior to the adoption of the Uniform Trust Receipts Law, the only instance where the security title of a trust receipt holder was permitted to prevail against the claims of creditors of the trustee or against his trustee in bankruptcy, was where the title of the entruster or trust receipt holder was derived from someone other than the trustee. Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441; In re James, Inc., supra; In re Fountain, 2 Cir., 282 F. 816, 25 A.L.R. 319. Where the title of the entruster was derived from the trustee and not from some third person, the transaction was treated as being similar to a chattel mortgage and was held to be void as against creditors of the trustee in the absence of recordation. Arena v. Bank of Italy, supra.

If in the instant case defendant held the title to the automobiles at all times,

as was found by the court, deriving such title directly from the Chrysler Corporation, its security interest would be protected under the former law as well as under section 3016.4 of the Civil Code. The evidence discloses with respect to the Chrysler automobiles that although they were shipped by the Chrysler Corporation directly to Reagan, accompanied by invoices made out to Reagan, the bills of lading were made out to, and were sent directly to defendant. The evidence is conflicting as to whether sight drafts were attached to all of such bills of lading, but it appears without controversy that in every instance, whether by paying such drafts, or by other arrangements, defendant paid the full purchase price for such automobiles directly to the Chrysler Corporation. Moreover, defendant paid all of the freight charges. The bills of lading were not delivered to Reagan until after the trust receipts had been signed. Concerning the Plymouth automobiles which were delivered from the Los Angeles office of the Chrysler Corporation, defendant after securing trust receipts from Reagan, ordered the cars to be delivered to Reagan's place of business and paid the purchase price directly to the corporation. There is no evidence whatever tending to prove that Reagan at any time prior to signing the trust receipts, had either title to or possession of any of the automobiles in question. Although the trial court found that defendant was at all times the owner of the automobiles in question, it was of no consequence whether defendant's title originated with the Chrysler Corporation or with Reagan.

Plaintiff places great reliance upon the case of Arena v. Bank of Italy, supra, in support of his contention that a trust receipt which does not comply with the provisions of section 3440 of the Civil Code is void as against creditors of the trustee. That decision, however, is clearly distinguishable upon its facts from the instant case. It must be borne in mind that the Arena case was decided long prior to the enactment of the Uniform Trust Receipts Law. In the Arena case, one Dellaira having both the title and possession of certain goods, assigned and delivered possession of such goods to the Bank of Italy as security for an indebtedness; thereafter the bank restored the possession of such goods to Dellaira and, at the same time took the trust receipts in question from Dellaira. Obviously, whatever title or interest the bank acquired could only have been derived from Dellaira, the trustee under the trust receipts. The court properly held that under the law which existed at that time, i. e., prior to the enactment of the Uniform Trust Receipts Law, the transaction was to be treated as being in the nature of a chattel mortgage and consequently void as against the trustee's (debtor's) creditors unless properly recorded.

[1] From the foregoing discussion it appears that under the former law the source of the entruster's title was the controlling factor in determining whether or not a given trust receipt transaction was valid. However, under the existing law, by which the instant case is to be governed, the entruster's security interest will be protected whether his title is derived from the trustee or from a third party. From an examination of section 3014 of the Civil Code, which defines trust receipt transactions, it is apparent that the legislature intended to include within the general provisions of the law all trust receipt transactions without regard to the source of the entruster's title. That section provides, among other things: "The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise."

The only case which has come to our attention, involving an interpretation of the California Uniform Trust Receipts Law, is In re Boswell, D.C., 20 F.Supp. 748, affirmed, in 9 Cir., 96 F.2d 239. The facts of that case were similar to those of the Arena case in that the entruster derived its title from the trustee who had both possession and title to the merchandise covered by the trust receipt. Thereafter the trustee became bankrupt and action was brought by the entruster to reclaim the merchandise from the trustee in bankruptcy. It was held that under the sections of the Civil Code comprising the Uniform Trust Receipts Law, such a transaction was valid and enforceable and that the entruster was entitled to reclaim the merchandise in question from the trustee in bankruptcy.

[2] No contention is made that the trust receipts involved do not comply with the provisions of sections 3012 et seq. of the Civil Code. A statement of trust receipt financing was filed with the secretary of state in accordance with the provisions of section 3016.9 and within the time limited by section 3016.3. Unquestionably, under

such circumstances, the security interest of defendant is entitled to be protected by the express provisions of the law against the claims of Reagan's creditors or his trustee in bankruptcy. Section 3016.3 of the Civil Code provides: "(1) (a) If the entruster within the period of thirty days * * * files as in this title provided, such filing shall be effective to preserve his security interest in documents or goods against all persons * * *." Section 3016.4 provides: "(1) The entruster's security interest in goods, documents or instruments under the written terms of a trust receipt transaction, shall without any filing be valid as against all creditors of the trustee, with or without notice, for thirty days after delivery of the goods, documents or instruments to the trustee, and thereafter except as in this chapter otherwise provided. * * *"

[3-5] Plaintiff next attacks the constitutionality of the Uniform Trust Receipts Law. It is claimed that the act is void because of its repugnancy to the provisions of section 24, article IV, of the California Constitution, which provides essentially that only one subject shall be embraced within each act and that such subject shall be expressed in the title of the act. Plaintiff asserts that the act purports to deal with the subject of chattel mortgages as well as with trust receipts without so indicating in its title. The title of the questioned act is as follows: "An act to add a new chapter to Title XIV of Part IV of Division Third of the Civil Code to be known as Chapter III-A thereof, in relation to trust receipts and pledges of personal property unaccompanied by possession in the pledgee and to make uniform the law relating thereto and to amend section 2988 of the Civil Code relative to the lien of the pledgee." St.1935, p. 1930. Section 3014 (1) (c) of the Civil Code is the alleged portion of the act dealing with chattel mortgages. By this provision, a trust receipt transaction is defined as one whereby "the entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in goods or documents in possession of the trustee and the possession of which is retained by the trustee * * *."

In considering the sufficiency of the title to an act in the light of the constitutional provision under consideration, it must be remembered that neither the best, nor the most accurate title is required. Such title need not be a complete catalogue of every portion of the statute, it being deemed sufficient if it is reasonably suggestive of the legislative purpose. Heron v. Riley, 209 Cal. 507, 289 P. 160. The requirement is merely that the title must be a reasonably intelligible reference to the subject embraced in the enactment. Estate of Wellings, 192 Cal. 506, 221 P. 628. In re Boswell, supra.

In the light of the foregoing principles, the questioned title does not appear to be deficient. The only matters embraced by the act are trust receipt transactions and pledges unaccompanied by possession, which matters are stated in the title. At the time this law was enacted such so-called "trust receipts" were being widely used in the commercial world and were commonly understood to be forms of security instruments closely resembling, yet distinguishable from a chattel mortgage, pledge or conditional sale. As we have shown prior to the enactment of the questioned legislation a trust receipt transaction wherein the title of the entruster was derived from someone other than the trustee was held valid in this state. It was also held in this state that a trust receipt transaction wherein the title of the entruster was derived from the trustee was invalid. Arena v. Bank of Italy, supra. In the latter case, our Supreme Court classified the security instrument involved as a "trust receipt" but held that under existing law, the transaction was invalid because of failure to record as in the case of a chattel mortgage. It is apparent therefore that at the time the act was adopted the terminology used in the title was a reasonably intelligible reference to the matters embraced within the text of the act. Certainly the term "trust receipt" had a definitely accepted meaning, a departure from which cannot be found in the body of the act. The term "pledges unaccompanied by possession" undoubtedly was intended by the legislature to alter the existing law relating to pledges and to render valid a type of "trust receipt" transaction similar to that involved in the Arena case. It is to be presumed that the legislature was aware of the existing law and that when it used the term "trust receipt" it referred to all types of security instruments which had theretofore been classified as trust receipts. Such was the holding in the case of In re Boswell, supra, wherein a type of security instrument, identical with that of the Arena case,

was held to be valid under the Uniform Trust Receipts Law. Nowhere in the title of the act nor in the text thereof is there any reference to chattel mortgages or to any other type of security interest not theretofore included within the accepted meaning of the words "trust receipt transaction". We conclude therefore that the act is not invalid because of its asserted repugnancy to section 24, article IV, of the Constitution.

[6, 7] The further contention is made that the Uniform Trust Receipts Law repeals by implication sections 3440, 2955, 2977 and 2920 of the Civil Code, dealing in general with chattel mortgages and bulk sales. There is no merit in this contention, for trust receipts constitute the only type of security interest which is not governed by the same laws that existed prior to the enactment of the legislation in question. Sections 3440, 2955, 2977 and 2920 of the Civil Code are still effective and permit the use of the types of security interests therein mentioned. It is true that the questioned legislation validates a type of trust receipt transaction resembling a chattel mortgage theretofore held invalid, but no change has been made in the law relating to chattel mortgages as such. The wisdom of this change is a matter for legislative, not judicial concern.

[8, 9] The act itself enjoins us to so interpret and construe the act "as to effectuate its general purpose to make uniform the law of the states which enact it". Civ.Code, sec. 3016.14. This rule of construction has for its purpose the object of unifying the laws of the several states on the same subject and is therefore not to be treated as a codification of local laws or commercial customs. The fundamental purpose of the act in question should be considered in the light of the general commercial law of the country as a whole. "The principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it." Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co., 239 U.S. 520, 528, 36 S.Ct. 194, 197, 60 L.Ed. 417. The conclusions we have reached concerning the interpretation of the law are fully in accord with these principles and are supported by the well-reasoned opinions of the Federal District Court and Circuit Court in the case of In re Boswell, D.C., 20 F.Supp. 748 (affirmed, 9 Cir., 96 F.2d 239), wherein the identical issues were presented by the attack upon the constitutionality of the act.

[10] The contention that defendant's repossession of the automobiles within four months prior to the time when Reagan filed his petition in bankruptcy constituted a preference in violation of section 60, sub. a of the United States Bankruptcy Act, 11 U.S.C.A. § 96, sub. a, is without merit. The security interest of the defendant was paramount to the claims of all other persons, including the trustee in bankruptcy. In re Boswell, supra. Moreover, by the express provisions of the trust receipts the cars were to be held in trust as the property of defendant and the latter was given the right to repossess them at any time.

[11] The fact that Reagan concurrently with the execution of the trust receipts executed promissory notes to defendant in the same amounts as the amount of the trust receipts did not render the transactions invalid. It is argued that the act makes no provision for the execution of such notes in connection with a trust receipt transaction and that to require such notes is inconsistent with a trust relationship. No authorities have been cited in support of such contention and we have been unable to find any authority which indicates that there is anything inconsistent in such a transaction. On the contrary, such authorities as In re Boswell, supra, and General Motors Acc. Corp. v. Kline, 9 Cir., 78 F.2d 618, sustain the validity of substantially similar trust receipt transactions, where both promissory notes and trust receipts were executed.

Judgment affirmed.

37 Cal.App.2d 567

## EMPLOYERS' LIABILITY ASSUR. CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11242.

District Court of Appeal, First District, Division 1, California.

March 1, 1940.

Hearing Denied April 29, 1940.

**1. Workmen's compensation ⇐665**

That employee was engaged in the performance of a personal act when injured does not per se determine that the injury did not arise out of the employment. St. 1937, p. 269, § 3600.

**2. Workmen's compensation ⇐51**

The doctrine of strict construction of compensation statutes is not applicable in California.

**3. Workmen's compensation ⇐606**

An injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do. St.1937, p. 269, § 3600.

**4. Workmen's compensation ⇐652**

Such acts as are necessary to the life, comfort, and convenience of a servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in their performance "arises out of employment." St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of Employment."

**5. Workmen's compensation ⇐606**

In determining whether a particular act is reasonably contemplated by the employment so that an injury received while performing such act may be compensable, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and other factors should be considered, and any reasonable doubt as to whether the act is contemplated by the employment, in view of the policy of liberal construction in favor of employee, should be resolved in favor of the employee. St.1937, p. 269, § 3600.

**6. Workmen's compensation ⇐709**

Where cook in private residence was required to live at employer's residence and as part of compensation received board and room, and on what was normally her day off remained at the residence and was on call and was injured in fall from stool on which she stood to observe hem of dress which she was shortening, injury "arose out of and in the course of the employment," and was compensable, since it was contemplated by the employment that cook would perform acts such as she was performing, while in her room on call. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of and in the Course of Employment."

---

Proceeding under the Workmen's Compensation Law by the Employers' Liability Assurance Corporation, insurance carrier, to annul an award of the Industrial Accident Commission in favor of Grace Burnett, employee, who was injured while employed as a cook in the private residence of Chalmers G. Graham, employer.

Award affirmed.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PETERS, Presiding Justice.

Petitioner, Employers' Liability Assurance Corporation, seeks by this proceeding to annul an award of the Industrial Accident Commission in favor of Grace Burnett, who was injured while employed as a cook in the private residence of her employer, Chalmers G. Graham. Petitioner is the insurance carrier for Graham, who, though not required to do so at the time of the accident had voluntarily insured his domestic servants.

The facts surrounding the employee's injury are not substantially in dispute. Mrs. Burnett, under her contract of employment, was required to live at her employer's residence, and, as part of her compensation, received her board and room. She was injured on Thursday, June 1, 1939. This was normally her "day off". Her employer customarily employed a maid, but the maid had left the employment the preceding Saturday, so that Mrs. Burnett's duties during this period were increased. She testified that, because of the absence of the maid, she worked on the day in question until 11 or 11:30 a. m., and told Mrs. Graham she would return early that evening to wash the dishes. She returned to her employer's

residence a little before 8 p. m. She put an apron over her street dress, and washed the dinner dishes. She then retired to her room. She testified that she was then on call—that she would have answered the telephone or the doorbell, had the necessity arose, and that she was expecting a call from her employer to take care of the Graham child. While she was waiting, she noticed that her dress was a little long. The mirror in her room was not adjustable. In order to more clearly observe the hem of her dress she stood on a stool. While engaged in shortening the dress she slipped and fell, fracturing her left ankle and dislocating her left elbow. The commission found that these injuries occurred in the course of, and arose out of, the employment, and made its award accordingly.

It is the theory of petitioner that the injury received by Mrs. Burnett did not arise out of the employment, nor was it received in the course thereof; that to be compensable the injury must be received while the employee is engaged in some necessary act reasonably incidental to the employment; that, in the present case, the injury was received while performing a purely personal act, and is, therefore, not compensable.

Under section 3600 of the Labor Code, St. 1937, p. 269, to be compensable, the injury must both arise out of, and be in the course of, the employment. In the present case there can be no doubt that the injury was received while the employee was in the course of her employment. Under the doctrine announced in Larson v. Ind. Acc. Comm., 193 Cal. 406, 224 P. 744, and State Comp. Ins. Fund v. Ind. Acc. Comm., 194 Cal. 28, 227 P. 168, where an employee is required to live on the employer's premises, any injury received while the employee is making a reasonable use of such premises is in the course of the employment, even though received during the employee's leisure time. The theory advanced in these cases is that board and room are part of the employee's compensation which is being earned at all times while the employee is on the premises, and that, therefore, the earning and collection of such compensation is as much a part of the employment as is the performance of service, and is reasonably incidental thereto. In the Larson case, supra, the injuries were received after normal working hours while the employees were resting in the bunkhouse when a fellow employee poured kerosene on the bunkhouse stove. It was held that the injury was received in the course of (and, under the facts there involved, also arose out of) the employment. In discussing the question whether the injury was received in the course of the employment the court quoted with approval from Associated Oil Co. v. Ind. Acc. Comm., 191 Cal. 557, 217 P. 744 as follows (193 Cal. at page 410, 224 P. at page 745): " 'The general rule appears to be that when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. (1 Schneider Workmen's Compensation Law, p. 608, par. 279.) * * *' " This same rule was quoted and relied on in the case of State Comp. Ins. Fund v. Ind. Acc. Comm., supra, 194 Cal. at page 32, 227 P. 168. In that case a resident maid of the Fairmont Hotel was injured while leaving the hotel on her "day off". After holding that the particular injury arose out of the employment because of the peculiar hazard there involved, the court discussed at length the question whether such an injury was received in the course of the employment. The court quoted from, and discussed, several cases and then stated (194 Cal. page 33, 227 P. page 169): "Miss Glennan was to be furnished all of her meals at the hotel as a part of her compensation for her labor. It was a part of the express written contract creating her status as an employee that she should live at the hotel and receive her meals there. That was her residence solely because of her employment, and she was upon the premises to sleep and eat her meals, because room and meals were the exchange in which she was paid in part for her labor. She was in the course of her employment when she was collecting this remuneration just as much as when she was performing the labor that earned the remuneration. The contract between the parties was reciprocal."

Under these decisions there can be no doubt that the employee in the present case was in the course of her employment when injured. The only debatable question is whether the injury can be said to have arisen out of the employment.

[1] The mere fact that the employee was engaged in performing a personal act when injured does not, per se, determine that the injury did not arise out of the employment. In Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911, the com-

mission denied liability to a salesman who was killed by an automobile while crossing the street on his way to the employer's plant to get his overcoat which was in a burning building. The Supreme Court reversed the commission and held that (219 Cal. page 714, 28 P.2d page 913): "Leffert was, when injured, engaged in doing something he might reasonably have been expected to do while in the performance of his duty." In Western Pac. R. R. Co. v. Ind. Acc. Comm., 193 Cal. 413, 224 P. 754, compensation was allowed for the death of a messenger who was struck by an automobile while returning on his bicycle to his place of employment from his home where he had gone to get his raincoat. In Whiting-Mead Co. v. Ind. Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518, an award of compensation was affirmed where an employee had injured his hand while working for his employer, and later, while lighting a cigarette, set fire to the bandage which had been soaked in turpentine. It was held that the act of smoking was reasonably contemplated by the employment, and, therefore, an injury so received was compensable. In this decision several cases from this and other jurisdictions are referred to with approval where injuries, though received while performing a personal act, were held to arise out of the employment. At page 506 of 178 Cal., at page 1105 of 173 P., 5 A.L.R. 1518, these cases are referred to as follow: "There are many decided cases which bear more or less directly upon the question here presented. In one of them (Martin v. Lovibond & Sons, 7 B.W.C.C. 243), a drayman employed by a firm of brewers was run down by an automobile and killed. His hours of employment were from 8 in the morning until 9 in the evening, or later. During his working hours he took no meals at home. On the day of his death he left his team at the side of the street, and crossed the way for the purpose of refreshing himself at a public house with a glass of beer. He was in the public house about two minutes. While crossing the street to return to his dray he was killed. Compensation was allowed. In two cases (Archibald v. Ott, 77 W.Va. 448, 87 S.E. 791, L.R.A.1916D, 1013; Keenan v. Flemington Coal Co., 5 [Sc. Sess. Cas., 5th series] 164 [10 Scott, L.T. 409]), compensation was awarded for the result of accidents suffered while employes had left the actual performance of their work to procure drinking water. In another case (Carinduff v. Gilmore, 7 B.W.C.C. 981), a girl who was employed on the top of a threshing machine stopped her work to partake of refreshment provided by her employer, and suffered an injury while so engaged. Compensation was awarded. In one case (Northwestern Iron Co. v. Ind. Comm., 160 Wis. 633, 152 N.W. 416), it was held that an employe, injured while warming himself during a labor which subjected him to the cold, is entitled to compensation. In at least three cases (Cook v. Manvers Main Collieries, 7 B. W.C.C. 696; Elliott v. Rex, 6 [B.] W.C.C. 27; Zabriskie v. Erie R. Co., 86 N.J.L. 266, 92 A. 385, L.R.A.1916A, 315), compensation was allowed for injuries suffered by employes during absence from actual work in response to calls of nature. In a California case (Brooklyn Min. Co. v. Ind. Acc. Comm., 172 Cal. 774, 159 P. 162), a miner was proceeding from one working place in a mine to another, passing over the surface of the ground from shaft to shaft in order to reach the second point. The day was very hot, and he paused in the shade of an ore bin to rest. The bin collapsed and killed him. Compensation was awarded."

There are other cases applying the same rule. In Corpora v. Kansas City Public Service Co., 129 Kan. 690, 284 P. 818, an employee was awarded compensation for injuries received when he fell while changing from his street clothes to his working clothes. The Corpora case cites and relies upon the case of In re Matermack, Ohio, 12 N.C.C.A. 665, where an employee threw his shoulder out of its socket while taking off his work shirt after working hours, and the case of Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 P. 372, 6 A.L. R. 1145, where an employee was injured while at play during the noon hour. In these cases it was held the injury arose out of the employment.

In Campbell's Workmen's Compensation, volume 1, pages 199–202, there are collected many cases illustrating the application of the rule that injuries received while performing a personal act are compensable if such act was reasonably contemplated by the employment. Among others, the following injuries have been held to be compensable as arising out of the employment: Injuries received while the employee is in or on the way to the lavatory; changing to or from working clothes; putting away personal belongings prior to the commence-

ment of work; bathing; seeking shelter from the rain; getting a drink of water for a fellow employee or for himself; cooking his luncheon on his employer's stove; chopping wood for his own use; going for luncheon left in dressing room; answering a personal telephone call; drying hair, etc., etc.

It is true that there are cases from other states (some of which are collected by Campbell on pages 202, 203 of his work) denying liability under factual situations somewhat comparable to those set forth above. Petitioner refers to many of these cases. Typical of these cases is Brienen v. Wisconsin Public Service Co., 166 Wis. 24, 163 N.W. 182, where an employee was denied compensation when injured while doing her personal laundry on her employer's premises after working hours. In Kane v. Barbe, 210 App.Div. 558, 206 N.Y.S. 444, a cook was injured while in her own room on her employer's premises after working hours when she fell out of a rocking chair while taking off her shoes. The injury was held noncompensable. Other cases similar in nature could be referred to.

[2-4] Some of the cases denying liability for injuries received while performing personal acts are based on the doctrine of strict construction of compensation acts. That doctrine has never been adopted in this state. Many of the apparently conflicting decisions are not in fact conflicting when analyzed. Each case must necessarily turn on its own facts. The true rule to be derived from the cases is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do. State Comp. Ins. Fund v. Ind. Acc. Comm., 194 Cal. 28, 227 P. 168; Hartford A. & I. Co. v. Ind. Acc. Comm., 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392. In applying this rule California has adopted the doctrine first announced in Archibald v. Ott, 77 W.Va. 448, 87 S.E. 791, L.R.A. 1916D, 1013, and quoted with approval in Whiting-Mead Co. v. Ind. Acc. Comm., supra, 178 Cal. at page 507, 173 P. at page 1106, 5 A.L.R. 1518, as follows: "'Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment.'"

[5] If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee.

[6] Applying this test to the instant case, we believe the act was reasonably contemplated by the employment. A household servant is in a different category from most other employees. Normally she does not work, and this particular employee did not work, during definite hours. She is always on call. The employment requires her to live on the premises. She must be neat in dress and general appearance. It is necessarily contemplated by the employment that she must perform personal acts such as she was here performing while she is in her room on call. The same rule cannot be applied to such an employee that would be applied to an employee such as a stenographer who works set hours and whose employment would not necessarily contemplate sewing or other adjustment of clothes during working hours. In the case of domestic servants it is normally one of the implied terms of the employment that the employee may, and shall, perform such tasks. They are incidental to, and arise out of, the very nature of the particular employment.

The award is affirmed.

We concur: KNIGHT, J.; WARD, J.

37 Cal.App.2d 459

**BUTTRAM et al. v. FINLEY et al.**

**Civ. 6212.**

District Court of Appeal, Third District, California.

Feb. 26, 1940.

Hearing Denied April 25, 1940.

**1. Wills ⇐822**

Under will, devising residue of testator's land on his widow's demise to his sister or to her heirs if she died before widow's death and directing use of stated amount out of common property to procure monument to be placed at widow's grave, payment of cost of erecting monument was not "condition precedent" to passing of title to land to sister's heirs, but provision therefor was in nature of mere covenant or equitable lien creating charge on residue of land devised.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent."

**2. Deeds ⇐154**
**Wills ⇐629**

The law does not favor creation of conditions precedent which defeat vesting of estates, and conditions in deed or will should be strictly construed in favor of such vesting rather than to defeat title intended to be conveyed by instrument.

**3. Executors and administrators ⇐315(5)**

While unambiguous language of distribution decree is controlling on decedent's heirs and devisees under his will with respect to interests acquired thereby, will may be resorted to for purpose of determining testator's intention respecting subject in controversy when language of decree is uncertain, vague or ambiguous.

**4. Executors and administrators ⇐315(5)**

The term "condition precedent" in distribution decree, conveying life interest in half of residue of testator's estate to his widow and residue of such half on her death to his sister or, if she died before widow, to sister's heirs, "but as a condition precedent the said share * * * is subject to" stated amount to be invested in monument to be erected at widow's grave according to will, is inconsistent with subsequent provision of decree that such amount "is hereby made a charge upon said residue devised to" sister or her heirs, so as to authorize reference to will to determine testator's intention respecting payment of cost of monument.

**5. Wills ⇐657**

A "condition precedent," as in will, is condition to be performed before any right intended to be created thereby accrues. Civ. Code, § 1436; Probate Code, § 142.

**6. Executors and administrators ⇐315(5)**

Under distribution decree, conveying life interest in half of residue of testator's estate to his widow and residue of such half on her death to his sister or, if she died before widow, to sister's heirs, "but as a condition precedent the said share is subject to" stated sum to be invested in monument to be erected at widow's grave according to will, and making such amount a charge on residue devised to sister or her heirs, sister's death before that of widow, not payment of cost of monument, was "condition precedent" to passing of title to sister's heirs.

**7. Executors and administrators ⇐315(5)**
**Wills ⇐449**

A construction of will or distribution decree which leads to intestacy or partial intestacy is not favored by law.

**8. Executors and administrators ⇐315(5)**

In absence of language in distribution decree clearly forfeiting title to legacies or devises for failure to fulfill covenants or equitable charges, such provisions in will do not constitute "conditions precedent" or "conditions subsequent" and title to property is not forfeited by failure to make specified payments.

See Words and Phrases, Permanent Edition, for all other definitions of "Conditions Subsequent."

**9. Executors and administrators ⇐315(5)**

When distribution decree conveys title to land with condition attached and provides that obligation shall be made charge or lien on property, lien is convincing evidence that devise of land was not intended to be defeated by failure to pay obligation.

---

Appeal from Superior Court, Sonoma County; Benjamin C. Jones, Judge.

Suit to quiet title to realty by H. S. Buttram and others against Livonia J. Finley and others. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Murphy & Brownscombe, of Santa Rosa, and James F. Brennan, of San Francisco, for appellants.

Geary & Geary and C. J. Tauzer, Barrett & McConnell, and J. O. Kroyer, all of Santa Rosa, for respondents.

PER CURIAM.

The plaintiffs have appealed from a judgment which was rendered against them in a suit to quiet title to real property. The will of Henry Clay Mizer, deceased, devised to his wife Sarah a life estate in the undivided one-half of his real and personal property. The remainder in that property, except the remainder in a sixty-acre tract which was given to another party, at the death of the widow was devised to Nancy Buttram, a sister of the testator, and in the event of her death before that of the widow, the property was to pass to the heirs of Nancy Buttram. The land was subjected to a charge of $1,500 to be expended in erecting a monument on the grave of the widow. Sarah Mizer survived Nancy Buttram. At the death of the testator's sister her heirs immediately became entitled to a vested remainder in the property, subject to the life estate of the widow, and subject to the charge of $1,500 to erect a monument on the widow's grave when she died. The widow died in 1928. The monument was not erected. In this suit to quiet title to the land, the trial court held that the construction of the monument was a "condition precedent" to the passing of title to the heirs, and that their failure to erect the monument defeated their title. A judgment was accordingly rendered to the effect that the plaintiffs take nothing by their action, and that the defendants recover their costs of suit. From that judgment this appeal was perfected.

Henry Clay Mizer died testate in Sonoma county in 1877, possessed of real and personal property, including the land which is involved in this suit. He left surviving him a widow, a nephew and a sister, together with heirs of the latter, who are plaintiffs in this action. The will was admitted to probate. After making a certain devise it provided, with relation to the property affected by the judgment in this suit, that: "Upon the demise of my wife I give and devise to my sister Nancy Buttram, * * * the remainder and residue of my property, and in the event of her death before my said wife, then to the heirs of my said sister Nancy Buttram," etc.

The will also contained a clause directing the construction of monuments over the graves of the testator and his wife, as follows: "I direct that my body be decently buried, and that out of the common property the sum of fifteen hundred dollars be used to procure a monument to be placed at my grave, and that out of the common [property] the same amount also be used to procure a proper monument to be placed at the grave of my wife on her decease."

The final decree of distribution was entered April 12, 1880, conveying to Sarah P. Mizer, the widow of the testator, who remarried after the death of her husband, and was then known as Sarah P. Lynch, specified property in the following manner: "One half of the residue of said estate and a life interest in the other half and on her death * * * to the said Nancy Buttram if she survives her (Sarah P. Lynch) the residue of said other one half after deducting said 60 acres, but should said Nancy die first then to her heirs but as a condition precedent the said share to Nancy Buttram or her heirs is subject to the sum of $1500.00 to be invested in a monument to be erected to the said Sarah P. Lynch according to said will; and the said amount is, and is hereby made a charge upon said residue devised to Nancy Buttram or her heirs."

The monument was erected on the grave of Mr. Mizer as directed by the will. Nancy Buttram died March 3, 1921. Her heirs thereupon became entitled to a vested remainder in the property subject to the life estate of the widow and subject to the erecting of the $1,500 monument on the widow's grave when she died. The widow again married and assumed the name of Sarah P. Hart. She died January 4, 1928. This suit to quiet title was commenced by the heirs of Nancy Buttram and the grantees of some of them, on January 4, 1933. On the erroneous theory that the request of the testator to erect a monument on the grave of his widow at an expense of $1,500 became a "condition precedent" to the passing of title to the heirs of Nancy Buttram, the court adopted a finding that: "The plaintiffs have not, nor has either or any of them any right, title, estate or interest whatsoever in and to any of the lands and premises described in Paragraph I of the Findings of Facts herein."

It will be observed the will made no reference to the payment of the cost of the monument as a "condition precedent". Nor did it impress that property with a lien to secure the payment of the cost of the monument. It merely stated that the cost of the monuments should be paid "out of the common property". The decree of distribution, however does refer to a "condition precedent", and it purports to distribute the remainder to Nancy Buttram, who was then alive, or, in the event of her death, to her heirs, "subject to the sum of $1500.00 to be invested as a monument to be erected to the said Sarah P. Lynch, according to said will, and the said amount be and is hereby made a charge upon said residue devised to Nancy Buttram or her heirs."

In support of the judgment the respondents contend that the defendants' title depends exclusively upon the language of the decree which declares that the payment of the cost of the monument is a "condition precedent" to the passing of title to the heirs of Nancy Buttram, and that since the language of the decree is unambiguous, reference may not be had to the will to construe the meaning of that provision.

On the contrary, the appellants assert that since the decree refers to a "condition precedent" and also declares that the cost of erecting the monument shall become a charge against the lands devised, the two statements are inconsistent; that the language of the decree is uncertain and ambiguous for that reason, and the will may therefore be resorted to for the purpose of determining the intention of the testator in that regard. The appellants also contend that the law construes the language of the decree to create a mere lien against the land to secure the payment of the cost of the monument and that the failure to pay that obligation does not defeat their title to the land; that it is therefore unnecessary to resort to the will to determine the intention of the testator in that regard.

[1] We are constrained to hold the cost of erecting the monument on the grave of the widow of the testator was not a "condition precedent" to the passing of title to the land to the heirs of Nancy Buttram, but, on the contrary, that it was in the nature of a mere covenant or equitable lien which created "a charge upon the residue (of land) devised". The decree of distribution so states. That charge against the interest in the land established a lien to secure the payment of that obligation. That indebtedness did not accrue until the widow died in 1928. The will declares that the monument shall be erected "on her decease".

[2] The law does not favor the creation of conditions precedent which have the effect of defeating the vesting of estates. Conditions in a deed or will should be strictly construed in favor of the vesting of estates, rather than to defeat the title intended to be conveyed by the instruments. It is said in 1 Tiffany on Real Property (2d ed.) pp. 270, 273, secs. 79 and 80, in that regard:

"The law is favorable to the vesting of estates, and adverse to their destruction, and consequently a stipulation in a conveyance or a devise will be construed, if possible, not to create a condition. The courts will, by preference, construe language as creating a covenant, a trust, or an equitable charge. * * *

"On the principle of hostility to conditions, before referred to, a condition precedent is construed strictly in favor of vesting the estate."

[3-5] It is true that unambiguous language of a decree of distribution is controlling upon the heirs and devisees of a will with respect to the interests acquired thereby. Estate of Scrimger, 188 Cal. 158, 206 P. 65; Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001; 11B Cal.Jur. 787, secs. 1290, 1296. However, there are well-recognized exceptions to the rule that ordinarily a decree of distribution is final and conclusive. When the language of the decree is uncertain, vague or ambiguous, the will may be resorted to for the purpose of determining the intention of the testator with respect to the subject in controversy. Estate of Lockhart, supra; Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397; Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508; 11B Cal.Jur. 804, sec. 1299. In the Fraser case, supra, the will was resorted to for the purpose of explaining the use of the term "annuity" as it appeared in the decree of distribution. That reference was permitted for the reason that the word has a technical legal meaning in conflict with other language employed in the decree. That is the exact situation with respect to the term "condition precedent" as it was used in the decree of distribution in the present

case. That term is inconsistent with the language of the decree which also declares that the cost of erecting the monument "is hereby made a charge upon the residue (of land) devised" to the heirs of Nancy Buttram. We are therefore authorized to refer to the will to determine the intention of the testator with respect to the payment of the monument. In so doing we are convinced there was no intention on his part to make the payment of the cost of that monument a condition precedent to the passing of title to the land. If the cost of erecting the monument was intended to become a condition precedent to the conveyance of title, then no title could pass to the heirs until the obligation was fulfilled. It necessarily follows that since title would not pass under such circumstances, there was no power to make it a charge against the land. A condition precedent is one which is to be performed before any right, intended to be created thereby, accrues. Sec. 1436, Civ.Code. Section 142 of the Probate Code provides in part that: "A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect."

Since the decree deliberately makes the obligation to build the monument a charge against the property, it follows that it was not intended as a condition precedent.

If there is an inconsistency between the terms of a "condition precedent" as it is used in the decree and the declaration which follows that the cost of the monument is to be a charge upon the property interests of the heirs, then according to the rule of construction heretofore mentioned, the latter statement should prevail, and the title should pass to the heirs impressed with a lien to secure the payment of the cost of the monument.

[6] We are of the opinion the two statements in the decree may be reasonably reconciled in favor of sustaining the conveyance of title. When the court referred in the decree to a "condition precedent", that term undoubtedly applied to the contingency of the death of Nancy Buttram before that of Sarah P. Mizer, as the specifically expressed "condition precedent" upon which the title of the heirs of the testator's sister was to vest. The language of the decree may be reasonably construed to mean that the undivided one-half interest in the real property was thereby distributed to the widow for her lifetime, and upon her death the remainder was to go to Nancy Buttram, but in the event that the widow survived Nancy, then, as a condition precedent, the sister's share was to pass to her heirs. It was the death of Nancy which became the condition precedent to the passing of title to her heirs, and not the payment of the cost of the monument. It will be recalled that both Nancy and the widow were alive at the time the decree was rendered in 1880. It was definitely a condition precedent to the acquiring of title by the heirs that Nancy should die before the widow's demise. That identical situation is properly characterized by the text writers as a condition precedent. In 2 Tiffany on Real Property (3d ed.) 22, section 320, it is said in that regard:

"A contingent remainder is merely the possibility or prospect of an estate, which exists when what would otherwise be a vested remainder is subject to a condition precedent, or is created in favor of an uncertain person or persons. In the case of a limitation in favor of an uncertain person or persons, the ascertainment of such person or persons is no doubt itself a condition precedent. * * * A remainder is contingent when subject to a condition precedent although the condition is certain to be satisfied, as for instance, when the condition is the death of a particular person.

"A contingent remainder becomes a vested remainder as soon as the condition precedent is satisfied, or the person or persons to take ascertained, the particular estate still existing. * * * A contingent remainder becomes an estate in possession without ever becoming a vested remainder, that is, the particular estate terminates at the same time as the condition precedent is satisfied or the remaindermen are ascertained, as for instance in the case of a devise to A for life with remainder to B, provided B survives A, or a devise to A for life with remainder to his surviving children."

In accordance with the preceding text the devise of the remainder after the life estate to the heirs of Nancy Buttram, contingent upon the widow surviving her, became a condition precedent to the vesting of title in the heirs. Sarah P. Mizer did survive Nancy. The condition was then fulfilled, and the heirs then became seized of a vested remainder in the property free from the condition.

[7] In support of the theory that the devise of the property to the heirs of Nancy was not defeated by their failure to erect the monument, it is a significant fact that no disposition of the remainder was made by the will or decree in the event the devise to the heirs failed. Under such construction the deceased would become intestate as to that property. The construction of a will or decree which leads to intestacy or partial intestacy is not favored by the law. Estate of McCurdy, 197 Cal. 276, 282, 240 P. 498. 26 Cal.Jur. 899, sec. 215.

The decree in this case contains no language specifically forfeiting title to the land for failure to erect the monument. On the contrary, it definitely declares that the cost of the monument shall become a charge upon the land devised to the heirs. Certainly the will does not make the payment of the cost of erecting the monument a condition precedent to the passing of title to either Nancy Buttram or to her heirs. It does not even impose a lien upon the land to secure the payment of that obligation.

[8] It has been frequently held that in the absence of language clearly forfeiting title to legacies or devises for failure to fulfill covenants or equitable charges, such provisions do not constitute conditions either precedent or subsequent, and that title to the property is not forfeited by failure to make the specified payments. Cunningham v. Parker, 146 N.Y. 29, 40 N.E. 635, 48 Am.St.Rep. 765; Graves v. Deterling, 120 N.Y. 447, 24 N.E. 655; Taft v. Morse, 4 Metcalf, Mass., 523; Ditchey v. Lee, 167 Ind. 267, 78 N.E. 972; Casey v. Casey, 55 Vt. 518; Woods v. Woods, 44 N.C. 290.

In the Cunningham case, supra, the testator bequeathed certain legacies to designated children. He devised to his son, Alexander, real property "on condition" that he should pay to the other children within four years of the testator's death the legacies mentioned in the will. The legacies were not paid. It was held that the failure to pay the legacies did not constitute a condition either precedent or subsequent which had the effect of forfeiting title to the land.

In the Graves case, supra, where property was bequeathed subject to the payment of specified sums as a "charge upon the legacies" it was held there was no forfeiture of the title for failure to pay the obligations.

The rule announced in the preceding case with respect to the forfeiture of title to property for failure to meet a specified condition is approved in the case of Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229, which was a suit to quiet title. The deed to real property which was involved in that suit contained the clause that it was "to be used for a County High School ground and premises". The land was not used for that purpose, but it was sold. It was contended that clause constituted a condition subsequent, which rendered the title void for failure to conform to it. Mr. Justice Henshaw said: "It is fundamental that conditions subsequent, tending to restrict and defeat an estate, are not favored. * * * Generally speaking, the apt and appropriate words, evidencing that the grant is on condition subsequent, are found in a provision for forfeiture and right of reentry."

The court held that the failure to use the land for school purposes was not a condition subsequent which defeated the title. In that case there was no language in the deed declaring a forfeiture of title for failure to use the land for the purpose designated. Nor does the decree in the present case contain any such declaration of forfeiture. The absence of such language is persuasive proof that the obligation was not intended to be a condition precedent to the passing of title.

[9] The authorities hold that when a decree of distribution conveys title to land with a condition attached thereto, and further provides that the obligation shall be made a charge or lien upon the property, the lien is convincing evidence that the device was not intended to be defeated by failure to pay the obligation. It is said in those cases that the creating of the lien or charge upon the property is inconsistent with the theory of the existence of a condition precedent for the reason that if the title does not pass until after the performance of the condition there would be neither right nor reason for creating a lien to secure its payment. Taft v. Morse, supra; Ditchey v. Lee, supra.

Some of the cases hold that when a devise or grant is made and accompanied with a condition creating a charge or lien against the property, the remedy for fail-

ure to comply with that condition is to foreclose the lien in a proper proceeding. Ditchey v. Lee, supra. In the present case no effort was made to enforce the erecting of the monument. The decree does not limit the time within which the monument is to be constructed. The obligation did not accrue until Sarah P. Lynch died in 1928. This suit does not seek to enforce that obligation. The plaintiffs clearly have an interest in the property subject to the payment of that charge of $1,500 for the monument.

The judgment is reversed, and the court is directed to ascertain the interests of the several plaintiffs and render judgment in their favor quieting title thereto, subject to the joint and several obligation to erect the monument on the grave of Sarah P. Lynch at an expense of $1,500.




37 Cal.App.2d 663

**SONTAG et al. v. STRINGER et al.**

**Civ. 2516.**

District Court of Appeal, Fourth District, California.

March 7, 1940.

**1. Mortgages ⇐245**

Where a pledgee holds as collateral security a note secured by trust deed, pledgee foreclosing the trust deed has right to purchase the property for his own account and is not accountable for it to the pledgor, but is only accountable for the surplus, if any, over the amount of the pledge. Civ.Code, §§ 3006, 3011.

**2. Mortgages ⇐245**

Where complaint alleged in effect that pledgee holding as collateral security a note secured by trust deed foreclosed the trust deed under power of sale granted therein and purchased property, but did not allege that there was any surplus received from sale of collateral over and above amount due pledgee and pledgor claimed that pledgee held the property as trustee and sought an accounting for rents and profits after the foreclosure sale and did not allege fraud, the complaint did not state a cause of action.

**3. Courts ⇐90(1)**

Where a conclusion reached in a decision has been settled by long acquiescence on the part of the Legislature and the courts, it will ordinarily not be disturbed, even if its soundness is doubted.

**4. Courts ⇐90(1)**

Where for period of 70 years courts of state had recognized rule that pledgee foreclosing collateral security has right to purchase the collateral for his own account and is only accountable for surplus, if any, over amount of pledge, the rule would not be overruled because other states, many of which had different statutory provisions relating to pledges, had decided the question differently.

Appeal from Superior Court, Los Angeles County; Fred Miller, Justice pro tem.

Action by M. B. Sontag and others against A. E. Stringer and others to establish a trust and for an accounting. From an adverse judgment, plaintiffs appeal.

Affirmed.

Harry E. Templeton and Adolph H. Levy, both of Los Angeles, for appellants.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for respondents.

GRIFFIN, Justice.

Appellants' amended complaint sets forth in substance that appellant M. B. Sontag, in January, 1932, gave respondent A. E. Stringer his promissory note in the sum of $4,000, and as security for the payment thereof Sontag assigned and delivered to Stringer a promissory note for $10,000 and trust deed which he, Sontag, held. The collateral note becoming in default, Stringer caused a trustee's sale to be held of the trust deed securing said collateral note, and Stringer himself purchased the property for approximately $5,000. The complaint further alleges that in causing said trustee's sale to be held and in purchasing said property Stringer was acting as trustee for Sontag and other appellants; that Stringer now repudiates any such trust relationship; that the property was and is of the value of $50,000. Appellants ask that the court declare that said property is held by Stringer in trust for appellants,

that it be conveyed to them, that an accounting of the rents, issues and profits be had from the date Stringer took over the property, and for such other and further relief to which appellants may be entitled. The court sustained defendants' demurrer to plaintiffs' amended complaint with leave to amend in ten days. After due service of notice of such ruling plaintiffs failed to file an amended complaint. Judgment for defendant followed. From this judgment plaintiffs appeal.

Appellants argue that the court erred in sustaining respondents' demurrer to the amended complaint for the reason that when a pledgee holding as collateral security a note secured by a trust deed forecloses the trust deed under the power of sale granted therein and himself buys the property, then only the equity is foreclosed, and the pledgee thereafter holds the property merely as security for his debt, citing Farmers' Savings Bank v. Lesky, 8 Cir., 6 F.2d 539; Gilbert v. Thayer, 104 N.Y. 200, 10 N.E. 148; Blood v. Shepard, 69 Kan. 752, 77 P. 565; Hicks v. Dowdy, 202 Ala. 535, 81 So. 37; Lincoln Safe Dep. Co. v. Yeast, 117 Neb. 344, 220 N.W. 573, which in effect hold that the pledgee, upon foreclosure and purchase of the collateral security, holds the property purchased subject to the pledge agreement, and that the land is substituted for the trust deed as collateral security for the pledge and that the trustor or mortgagor's equity is foreclosed by such sale, but not the pledgor's equity, and that the latter's rights can be affected only by a pledgee's sale held in accordance with the law governing such sales.

In Wright v. Ross, 1868, 36 Cal. 414 in a three to two decision, the Supreme Court of this state decided the point raised in line with the above-cited cases but on a rehearing in a three to two vote, the decision was changed and the court held that the pledgee had the right to purchase the property for his own account and was not accountable for it to the pledgor, but was only accountable for the surplus, if any, over the amount of the pledge.

In the case of Kelly v. Matlock, 1890, 85 Cal. 122 at page 129, 24 P. 642, the court said, that under our code, had the pledgee foreclosed the mortgage and become the purchaser that he would not then hold title to the property as trustee for his pledgor, unless fraud be shown, citing Civil Code sections 3006 and 3011. The cases of McArthur v. Magee, 1896, 114 Cal. 126, 45 P. 1068; Hoult v. Ramsbottom, 127 Cal. 171, 59 P. 587; and Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 41 P.2d 378 (hearing denied by Supreme Court) follow the holding in Kelly v. Matlock, supra.

[1, 2] Appellants argue and endeavor now to point out that the California courts in the decisions referred to, have not recognized the trust character of the pledge relationship, and by virtue of that omission have held that a pledgee may foreclose the evidence of debt and purchase the property and hold it free of the pledge relationship without ever holding a pledgee's sale. It is to be noted that the amended complaint does not allege that there was any surplus received from the sale of said property, over and above the amount due respondent. Appellants claim the real property only and an accounting for the rents and profits of the real property after the foreclosure sale. Appellants do not allege, or claim to have alleged in their complaint, fraud of any kind and their complaint does not state a cause of action unless a pledgee in all cases becomes a trustee for the pledgor when he forecloses a mortgage or trust deed held as collateral security and purchases the real property given as security at the foreclosure sale.

[3, 4] It has been repeatedly held that where a conclusion reached in a decision has been settled by long acquiescence on the part of the legislature and the courts, it will ordinarily not be disturbed, even if its soundness is doubted. Sorensen v. Hall, 219 Cal. 680, 28 P.2d 667; County of San Diego v. Childs, 217 Cal. 109, 121, 17 P.2d 734. The fact that certain other states, many of which have different statutory provisions relating to pledges, have decided this question differently, there certainly is not now sufficient excuse for overruling a rule which has been decided by a long line of decisions of this state extending over a period of 70 years.

For the reasons expressed the judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

37 Cal.App.2d 561

## LEARNED v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

## MAHONEY v. SAME.

Civ. 11280.

District Court of Appeal, First District, Division 1, California.

March 1, 1940.

Hearing Denied April 29, 1940.

**1. Appeal and error ⇐80(4)**

Generally, a decree fixing liability and rights of parties but referring the case to a master or subordinate tribunal for a judicial purpose, such as the statement of an account upon which further decree is to be entered, is not "final" and is not appealable. Code Civ.Proc. § 963, subd. (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Final."

**2. Appeal and error ⇐80(4)**

The law contemplates but one appeal from a judgment after an accounting which is a substitute for findings.

**3. Appeal and error ⇐80(4)**

Where trial court found accountant's report to be incomplete, and directed further accounting in which certain principles set forth in the orders were to be followed, the judgment or order then given was not appealable as "final," but contemplated the making of a further order which would be the "final judgment." Code Civ.Proc. § 963, subd. (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment."

---

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Actions by George H. Learned and by Wensinger F. Mahoney against the Board of Education of the City and County of San Francisco and others, for accounting. From orders directing a further accounting and continuance of investigation after rendition and entry of decree pursuant to stipulation, defendants appeal. On motions by plaintiffs to dismiss the appeals.

Motions granted.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving C. Breyer, of San Francisco, of counsel), for appellants.

Sullivan, Roche & Johnson, of San Francisco, for respondent Mahoney.

Piccirillo & Wolf, of San Francisco, for respondent Learned.

WARD, Justice.

Motions by respondents to dismiss appeals from orders directing a further accounting and the continuance of an investigation into the books of defendant board, following the rendition and entry, upon stipulation of the respective parties, of a decree establishing that judgment be entered forthwith, with interest from the date thereof, upon an amount to be thereafter ascertained from an accounting. Such motions are made upon the ground that an order of this character is a nonappealable interlocutory order, and that the appeal should be dismissed as being prematurely brought. The actions are in mandamus, to compel the appellant board to pay to respondents, assignees of a number of teachers, an alleged salary deficiency. The above appeals, with certain variations as to dates, are similar.

After a partial computation by an accountant judgments were entered that defendants pay plaintiffs the amounts as determined, and partial satisfactions were filed. It appeared, however, that additional amounts might be due the assignors and an order was therefore made directing the accountant to make a further and final computation, applying certain principles established by the order.

[1] Defendants, while admitting that an interlocutory order is nonappealable, base the present appeal upon the theory that the order referred to was appealable as a special order made after final judgment. Code Civ.Proc. sec. 963, subd. 2; Nuckolls v. Bank of California, 10 Cal.2d 266, 74 P.2d 264, 114 A.L.R. 708. This leaves one issue to be disposed of, namely, was the order directing the entry of judgment, based on computations to be ascertained, a final, or merely an interlocutory, order. If any confusion existed (Middleton v. Finney, 214 Cal. 523, 6 P.2d 938; Hollar v. Saline Products, Inc., 3 Cal.2d 80, 43 P.2d 273), based upon early cases in California and elsewhere, as to whether or not an order to take an accounting, when such is necessary

to ascertain the amount of recovery, if any, is an interlocutory or final judgment, it has been set at rest in Gunder v. Gunder, 208 Cal. 559, 561, 562, 282 P. 794, 795, wherein the court said: "It is contended by the appellant that the judgment is a final judgment, in accordance with the rule stated in the case of Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. As stated by the court in that case, however, the decree there was similar to the decree from which an appeal was taken in the case of Clark v. Dunnam, 46 Cal. 204, and the decision of the latter case was followed by the court in the Zappettini Case. In neither of those cases did the decree involve a reference for an accounting, but in each case it ordered a sale of property and specified the distribution to be made of the proceeds. There was, therefore, in those cases no further judicial action required on the part of the court to adjudicate finally the rights of the parties.

"While there is a conflict of authority on the question whether a decree which settles the basic issues between the parties, adjudges the complainant's right to an accounting and refers the items of the account to be found by a master, etc., is an appealable judgment (see Wells v. Shriver, 81 Okl. 108, 197 P. 460), we are persuaded from an examination of the authorities that the rule adopted by the courts of this state and applicable to the present case is based on the desirability of subjecting the parties to but one appeal at the determination of the entire controversy between them (see Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579; Gianelli v. Briscoe, 40 Cal.App. 532, 536, 181 P. 105; Bancroft's Code Practice and Remedies, p. 8329), and is stated in Pomper v. Superior Court, 191 Cal. 494, at page 496, 216 P. 577, as follows: 'The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Jur. §§ 19, 20, p. 142; California Nat. Bank v. Stateler, 171 U.S. 447, 19 S.Ct. 6, 43 L.Ed. 233. See, also, Rose's U.S.Notes; Clement v. Duncan [191 Cal.] 209, 215 P. 1025; Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579.'

"It is apparent upon the showing made in this case that the judgment is not and was not intended by the court to be a final determination of the controversy in the trial court, but that final judgment as to the issues adjudicated was reserved by the court, to be entered upon the submission of the referee's report, which would then be subject to 'the court's approval,' and at which time the court would also render its 'final judgment in favor of said plaintiff and against said defendant in such amount as the court may find that the plaintiff is entitled to,' and that the appeal should therefore be dismissed." See, also, Heywood v. Sooy, 4 Cal.2d 352, 49 P.2d 826; Cloud v. State Terminal Co., Ltd., 22 Cal.App.2d 568, 71 P.2d 600; Holmes v. Hatch, 11 Cal. 2d 376, 80 P.2d 70; White v. White, 26 Cal. App.2d 524, 531, 79 P.2d 759; McAllen v. Souza, 7 Cal.App.2d 130, 45 P.2d 832.

[2, 3] The law contemplates but one appeal taken from a judgment after an accounting which is a substitute for findings. Whether, under certain facts, an order for judgment is interlocutory or final, may be a close question in some cases; but in the instant proceeding the fact, that the court found the accountant's report to be incomplete and directed a further accounting in which certain principles set forth in the orders were to be followed, is indicative that the judgment or order then given was not final, but contemplated the making of a further order after the filing and approval of the accountant's report, this latter order being the final judgment in contradistinction to a special order made after judgment.

Reference is made, in the memoranda of points and authorities attached to the notices of motions to dismiss appeals, to orders made January 17, 1939. The record discloses that appeals were also taken from similar orders made September 28, 1938, and entered October 4, 1938. During oral argument and prior to submission of the motions filed, it was stipulated that the motions should be considered as applicable to all appeals from orders; those made September 28, 1938, and entered October 4, 1938, as well as those made January 17, 1939.

Motions to dismiss each and all appeals referred to in the clerk's transcript on appeal (Civil No. 11280) granted.

We concur: PETERS, P. J.; KNIGHT, J.

37 Cal.App.2d 674

## FERNANDEZ v. SECURITY FIRST NAT. BANK OF LOS ANGELES.

Civ. 11332.

District Court of Appeal, First District, Division 2, California.

March 8, 1940.

**1. Appeal and error ⇐989**

When findings are adverse to appellant, there is never a question on appeal whether evidence would have sustained a finding favorable to him, since if competent evidence supports finding which was made, that ends the controversy on the question of sufficiency of the evidence.

**2. Appeal and error ⇐931(1)**

When appeal rests on question of sufficiency of evidence to support finding which was made, appellate court must accord to the finding the benefit of all presumptions and inferences fairly applicable to the facts in evidence.

**3. Trusts ⇐44(1)**

In suit to impress a trust upon realty of deceased on theory that deceased had orally agreed that plaintiff might redeem the realty involved within one year, evidence sustained finding that no such oral agreement had ever been made.

**4. New trial ⇐104(1)**

A motion for new trial on ground of newly discovered evidence was properly denied, where such evidence was merely cumulative of that produced on trial.

---

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Frank M. Fernandez against the Security First National Bank of Los Angeles, a national banking association, as administrator with the will annexed of the estate of Ottowell W. Bashaw, also known as O. W. Bashaw, deceased, to impress a trust upon real property and for an accounting. From a judgment for defendant, plaintiff appeals.

Affirmed.

C. C. Towner and E. R. Simon, both of Los Angeles, for appellant.

Robert M. Porter and J. Stanley Mullin, both of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to impress a trust upon real property and for an accounting. Findings and judgment were both entered favorable to defendant.

[1, 2] The appellant states as the question involved on this appeal: "Was the evidence offered sufficient to establish an alleged oral agreement to allow plaintiff to redeem the real property * * * and to entitle plaintiff to * * * an accounting. * * *" We must of necessity first criticise the statement of the issue. When the findings are adverse to appellant there is never a question on the appeal whether the evidence would have sustained a finding favorable to him. If the competent evidence supports the finding which was made that ends the controversy on the question of the "sufficiency" of the evidence. It should be borne in mind further that, when the appeal rests on the question of the sufficiency of the evidence to support the finding which was made, the appellate court must accord to the finding made the benefit of all presumptions and inferences fairly applicable to the facts in evidence.

[3] With these rules in mind we will not attempt to make an extended reprint of the evidence, but will rest upon a brief statement of the facts which support the findings of fact and the judgment.

Prior to June, 1934, plaintiff owned certain real property subject to a first and second trust deed held by O. W. Bashaw. In October, 1934, the property was sold, after notice of default, to a party acting for Bashaw. Certain showcases and market fixtures had been placed in the premises by plaintiff, which he was purchasing under a conditional sales contract. Plaintiff had assigned his equity in this property to Bashaw, as additional security for his obligation under the deed of trust, and, after Bashaw's death, plaintiff sued his administrator seeking to establish a trust in these properties because of an alleged oral agreement with Bashaw to allow plaintiff one year to redeem.

For proof of the alleged agreement the plaintiff relied upon testimony of conversations held on June 26th, June 27th, and June 28th, 1934. These conversations were in the form of oral negotiations looking to an agreement whereby the plaintiff should undertake to execute a grand deed to Bashaw to save the latter from foreclosure

proceedings and, in consideration therefor, Bashaw was to give plaintiff a six months' option to repurchase the properties. To give plaintiff an opportunity to consult an attorney the parties agreed to meet again on June 27th, but plaintiff failed to keep the appointment. It is conceded that no definite agreement was made on June 26th, and that the conversations with plaintiff's brother on the 27th resulted in nothing more than a postponement until the following day. The parties met in the office of plaintiff's brother on June 28th. A deed was then prepared by one of those present, drawn for the purpose of transferring plaintiff's full title and interest to Bashaw. Plaintiff then agreed to meet Bashaw at the latter's office the following morning for the purpose of exchanging the deed of conveyance for Bashaw's option to plaintiff to repurchase the property.

It is manifest that up to this point no contract was made—that all the conversations detailed in the testimony were but oral negotiations designed to lead to the execution of a written contract, or contracts. Plaintiff's explanation of the reasons why no written contracts were executed differs in some respects from the testimony of defendant's witnesses. All were agreed, however, that no written contracts were signed. Plaintiff has sought to meet this obstacle with testimony of his brother that the two met Bashaw secretly and alone at the latter's office in Glendale on the morning of June 28th and that at that time Bashaw agreed to give plaintiff one year to redeem the property. This alleged oral promise the plaintiff seeks to make the basis of his claim of a parol trust.

The trial court refused to believe the story of this witness after it was shown by reliable witnesses that neither plaintiff nor his brother was in Glendale at the time, that Bashaw was not in Glendale, that plaintiff and his brother were both in Los Angeles at the time at the conference with the other witnesses, and that plaintiff offered no consideration for the purported promise to give him one year to redeem the property. It is not hard to understand why the trial court should discredit the witness Fernandez. His care to place the meeting where no one else could see or hear them; to limit those present to the plaintiff, himself, and Bashaw, who is deceased, when all other negotiations were made by Bashaw's agent with from five or six persons present; his statement that Bashaw there gave him a year's option to repurchase without any consideration whatever, whereas at all previous conferences the parties were negotiating for a six months' option with a valuable consideration running to Bashaw which would have saved him in time, money, and trouble from foreclosure proceedings; the fact that plaintiff formerly sued for damages alleging that Bashaw agreed to give him an option to repurchase and had failed to do so, whereas he now sues on the theory of an unperformed contract giving him such option; all these considerations were sufficient to justify the finding under attack. And over them all is cast the cloud that at no time, from the first negotiation to the present date, has plaintiff offered any equity on his part.

[4] Appellant claims error in the denial of his motion for a new trial. The argument is on the "insufficiency" of the evidence, which we have heretofore covered, and on the asserted newly discovered evidence. This evidence was merely cumulative of that produced by appellant, and of no better odor. There was no error in denying the motion.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.




37 Cal.App.2d 645

**PACIFIC STATES SAVINGS & LOAN CO. et al. v. PAINTER et al.**

**Civ. 11335.**

District Court of Appeal, First District, Division 2, California.

March 7, 1940.

Rehearing Denied April 6, 1940.

Hearing Denied May 6, 1940.

**1. Evidence ⇐601(4)**

Evidence of the contract of parties to pay a certain sum, in absence of any showing to the contrary, is itself some evidence that the sum is reasonable.

**2. Mortgages ⇐209**

In action to recover deficiency after sale under deed of trust, an award for trustee's

fees and expenses was not improper because no witness gave direct testimony as to reasonableness of charges, where deed of trust provided that proceeds of sale should be applied first to the costs, expenses, fees and other charges, including a reasonable compensation to the trustee and counsel fees in amount equal to 5 per cent. of amount secured and sum awarded was within such limitation.

**3. Payment ⇐65(6)**

When plaintiff has proved existence of debt sued on within period of statute of limitations, burden of proving payment is on defendant.

**4. Evidence ⇐383(7)**

Where deed of trust provides that recitals in trustee's deed are conclusive proof of matters of procedure relating to sale, plaintiff suing for deficiency is not required to make further proof thereof.

**5. Mortgages ⇐559(4)**

A judgment for plaintiffs in action to recover deficiency after sale under deed of trust was not erroneous on ground of absence of evidence of fair market value of property at time of sale, where evidence as to value of property at date of sale was uncontradicted.

**6. Mortgages ⇐559(2)**

The statute relative to determining amount of, and the time for entering, deficiency judgments, was not intended to be retroactive, and hence has no application to a deed of trust executed prior to effective date of statute. Code Civ.Proc. § 580a.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Pacific States Savings & Loan Company and another against Marion L. Painter and another to recover a deficiency after sale under a deed of trust wherein defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ray H. Kinnison and Bettin, Painter & Wait, all of Los Angeles, for appellants.

John L. Mace and Arch R. Tuthill, both of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Defendants appeal upon a bill of exceptions from a judgment favoring plaintiffs in an action to recover a deficiency after sale under a deed of trust.

On April 12, 1935, plaintiffs sued to recover the balance due upon the joint note of defendants executed on February 6, 1929, for $8,350. The balance alleged to be due after deducting payments and adding interest, advances made under the deed of trust, and trustee's fees and expenses, was alleged to be $2,044.06. After a fair and full trial of the issues judgment was entered for plaintiffs in that amount.

Two questions are raised by appellants—the sufficiency of the evidence to support the judgment, and the applicability of section 580a of the Code of Civil Procedure.

[1, 2] It is argued that there was no evidence that the sum allowed for trustee's fees and expenses was reasonable. No witness gave direct testimony that, in his opinion, such charges were reasonable. It is in the evidence that the respondents paid the fee claimed to the trustees and that the costs and expenses of posting and publishing notice of sale were also paid. The deed of trust provided that the proceeds of the sale should be applied to "first, the costs, expenses, fees and other charges of such sale, including a reasonable compensation to the trustee, and counsel fees in an amount equal to five (5) per cent of the amount secured hereby". The sum awarded was within this limitation. It is settled law that evidence of the contract of the parties to pay a certain sum, in the absence of any showing to the contrary, is itself some evidence that the sum is reasonable. This evidence, taken with the inferences which the trial court might draw from the facts proved, is sufficient to support the award.

[3, 4] It is argued that the judgment is not supported by evidence of notice of the default, time and place of sale, due conduct of the sale, and similar procedural matters. As to failure to prove the amount due on the note, the accepted rule is that: "When the plaintiff has proved the existence of the debt sued on within the period of the statute of limitations, the burden of proving payment is on the defendant. * * *" 20 Cal.Jur., pp. 952-3. As to the matters of procedure relating to the sale the rule is that where, as here, the deed of trust provides that the recitals in the trustee's deed are conclusive proof of those matters, the plaintiff is not required to make further proof thereof. Pacific States Sav-

ings & Loan Co. v. O'Neill, 7 Cal.2d 596, 599, 61 P.2d 1160.

[5] Appellants' complaint that there was no evidence of the fair market value of the property at the time of the sale is answered by the statement in their own brief reading: "The uncontradicted evidence of appellant, D. Howard Painter, * * * was that the value of the property here involved was, at the date of the sale, $8,500.00."

[6] Finally appellants argue that section 580a of the Code of Civil Procedure should be applied here, notwithstanding the deed of trust was executed in the year 1929. The decisions uniformly hold that this section was not intended to be retroactive and that it has no application to a deed of trust executed prior to its effective date. Birkhofer v. Krumm, 27 Cal.App.2d 513, 532, 81 P.2d 609; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Bank of America v. Burg Bros., 31 Cal.App.2d 352, 88 P.2d 196.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.




37 Cal.App.2d 648

## WAKEFIELD v. WAKEFIELD.

Civ. 2533.

District Court of Appeal, Fourth District, California.

March 7, 1940.

Hearing Denied May 6, 1940.

**1. Gifts ⇐65**

Where endorsement of stock certificate and its delivery to daughter occurred during last illness of mother, it could properly be classified as a "gift causa mortis."

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Causa Mortis."

**2. Gifts ⇐65**

Where mother who was confined to bed during her last illness, in discussion with her attorney, indicated desire that daughter have certain stock and endorsed stock certificate in blank, and before mother's death daughter placed in safety deposit box rented in both their names a sealed envelope which had written on it in mother's handwriting that contents belonged to daughter, and after mother's death envelope was found to contain the stock certificate, conclusion was warranted that mother had a present intention to make gift of the stock to her daughter and that intention was coupled with actual delivery of the certificate.

**3. Gifts ⇐82(1)**

Where mother, during discussion with her attorney, endorsed stock certificate in blank and indicated desire that daughter should have the stock, and before mother's death daughter placed in safety deposit box rented in both their names a sealed envelope which had written on it in mother's handwriting that contents belonged to daughter, and after mother's death envelope was found to contain the stock certificate, inference of mother's intention to give the stock to daughter was supported by presumption that daughter was innocent of wrong, as against contention that stock might not have been in envelope when endorsement was placed upon it. Code Civ.Proc. § 1963.

**4. Appeal and error ⇐1008(3)**

Where the language of an instrument is uncertain and its meaning ambiguous, the province of construing it is first presented to the trial judge, and construction placed upon it will not be disturbed on appeal unless it is unreasonable and unjustified.

**5. Gifts ⇐65**

Where mother, during discussion with her attorney, endorsed stock certificate in blank and indicated desire that daughter have the stock, and after mother's death, sealed envelope which had written on it in mother's handwriting that contents belonged to daughter was found in safety deposit box rented in both their names, the fact that envelope also had written on it that in event of both mother's and daughter's deaths, contents should go to another, was not indicative of intent to retain such dominion over the stock as to revoke gift causa mortis.

**6. Gifts ⇐80**

Where there is a confidential relationship between an ill mother and a daughter with whom she is living, and daughter obtains property of mother to which she asserts title after mother's death, there is a presumption of undue influence that will defeat transaction, but that presumption is

rebuttable and may be overcome by circumstantial as well as by direct evidence.

**7. Gifts ⇐80**

**Where mother who was confined to bed during her last illness indicated to her attorney the desire that daughter have certain stock, and endorsed stock certificate in presence of attorney, and daughter's subsequent possession of certificate was not disturbed by mother, presumption of undue influence by daughter was overcome, particularly in view of fact that after mother's death, certificate was found in a sealed envelope which had written on it in mother's handwriting that contents belonged to daughter.**

---

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by C. K. Wakefield, as administrator of the estate of Velma Stacey, deceased, against C. K. Wakefield, as administrator of the estate of Daisy Bernhauer, deceased. Judgment for plaintiff and defendant appeals.

Affirmed.

Frederick W. Docker, of Fresno, for appellant.

Robert M. Barnard and E. Clarke Savory, both of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to fourteen shares of the capital stock of the American Telephone and Telegraph Company.

Daisy Bernhauer and Velma Stacey were mother and daughter. Daisy died on December 5, 1935, and Velma in February, 1936. C. K. Wakefield was appointed administrator of both estates. Counsel have expressly waived the question of the propriety of C. K. Wakefield as administrator of the estate of Velma Stacey, deceased, suing himself as the administrator of the estate of Daisy Bernhauer, deceased. We express no opinion on that question but merely assume that the action was properly brought and defended.

The case was tried and submitted on an agreed statement of facts which we will summarize as follows:

In August, 1935, Mrs. Bernhauer, suffering from cancer, was confined to her bed, which she was unable to leave up to the time of her death on December 5, 1935. In August, 1935, she called her attorney to her bedside and asked to be advised as to the best way to dispose of her property so as to avoid the expense of probating her estate. He advised her against making outright gifts, but instead, to make a will. He was instructed to prepare deeds conveying certain of her real property, he returned with the deeds on August 30, 1935, and they were signed and acknowledged. She also consulted him about disposing of the fourteen shares of stock of the American Telephone and Telegraph Company, saying she wanted her daughter Velma to have it. He advised "that she could transfer title to the stock to her by making a will, or by indorsing same and delivering it to Velma Stacey". He also advised "that if she attempted to transfer the stock by simply endorsing the certificate and keeping same in her possession that she would be 'cutting corners' and likely create difficulties". Mrs. Bernhauer endorsed the certificate in blank but had possession of it when the attorney left. "During all this discussion Mrs. Bernhauer maintained that she wanted Velma Stacey to have the stock."

Mrs. Bernhauer and Velma Stacey had a safe deposit box rented in both their names, to which Velma had access. Sometime after August, 1935, and before the death of her mother, Velma placed a sealed envelope in this box. The envelope had written on it, in the handwriting of Mrs. Bernhauer, "The contents of this envelope belong to Velma Stacey—mother, Daisy Bernhauer. In case both Velma and I pass away, this goes to Henry D. Stacey, 3118 Sunset Boulevard, Houston, Texas."

When the safe deposit box was opened after the death of Mrs. Bernhauer the envelope containing the stock certificate was found in it. Evidently the stock certificate was then given to Velma because the stipulation recites that she unsuccessfully attempted to have it transferred to her name. The stipulation recites that "Velma Stacey was afflicted with tuberculosis, which caused her death in February, 1936."

Defendant urges that the agreed statement of facts does not support the judgment, in this: That there is no evidence of a sufficient delivery of the certificate by Mrs. Bernhauer to Velma; that there is no evidence showing when Mrs. Bernhauer placed the endorsement on the envelope; that there is no evidence that the envelope contained the stock certificate when the endorsement was written on it; that it then might have contained another document to

which the endorsement referred; that the portion of the endorsement stating that the contents of the envelope "goes to Henry D. Stacey" in case of the death of both Mrs. Bernhauer and Velma showed the intention of the former to have retained a dominion over the stock which negatived the idea of a present gift; that there is a presumption of undue influence on the part of Velma which has not been overcome and which defeats the attempted gift.

[1] As the endorsement of the stock and its delivery to Velma occurred during the last illness of Mrs. Bernhauer it may be properly classified as a gift causa mortis. In Braun v. Brown, Cal.Sup., 94 P.2d 348, 351, it was said:

"Section 1149 of the Civil Code defines a gift in view of death as 'one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver', and by section 1150 of the Civil Code a gift is presumed to be in view of death when made during the last illness of the giver or under circumstances which would naturally impress him with an expectation of speedy death. * * *

"Realizing, however, that under such circumstances any reference to or discussion of death is universally avoided by the patient, his friends and the doctor, section 1150 of the Civil Code declares that a gift made during the last illness or under circumstances which would naturally impress one with an expectation of speedy death is presumed to be a gift in view of death. This presumption is evidence and is sufficient to establish the fact unless rebutted."

The gift causa mortis is discussed in Noble v. Garden, 146 Cal. 225, 79 P. 883, 884, 2 Ann.Cas. 1001, where it is said:

"Gifts donatio mortis causa had their origin in the civil law, and were adopted with slight modifications into the common law. Ward v. Turner, 2 Ves.Sr. 431.

"Justinian defines a donatio mortis causa as 'that which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but, if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given.' * * * Thornton on Gifts, § 20, and cases cited. It is there said: 'But in a gift causa mortis a written instrument is not necessary. It may be, and usually is, made by parol; and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and the donee. * * * The most characteristic mark of distinction between a legacy and such a gift is the change of possession. From the nature of the donatio, it is apparent that the infallible test which must distinguish it from a testamentary gift is delivery, a change of dominion in praesenti. Without this there is really nothing to distinguish it from an ordinary testamentary bequest.' "

Also in Stout v. McNab, 157 Cal. 356, 107 P. 1005, 1006, the Supreme Court said: "A gift in view of death must be as absolute in its terms, so far as the donor and donee are concerned, as a gift inter vivos. The difference between them is that the one is revocable by the giver and the other is not. A gift in view of death may be revoked at any time by the giver, and it is revoked by law upon his recovery from the illness, or escape from the peril, under the presence of which it was made. Civ. Code, § 1151. Gifts of any other kind cannot be revoked by the giver. Civ.Code, § 1148. But the form of a gift in view of death is as absolute and unconditional as a gift inter vivos. The title must pass to the donee at the time the gift is made and the donor must part absolutely with all control and with the title, subject only to the condition imposed by law that it may be revoked, in which case the title is regained by the giver. Daniel v. Smith, 64 Cal. [346], 349, 30 P. 575."

[2] We think the inferences drawn by the trial judge, that Mrs. Bernhauer had a present intention to make a gift of the stock to her daughter Velma, coupled with the actual delivery of the certificate to her with intention to vest title in her, is supported by the evidence.

We have the declaration of Mrs. Bernhauer to her attorney that "she wanted Velma to have the stock", coupled with the advice of the attorney that, if this purpose was not accomplished by means of a will, it could only be accomplished by the endorsement of the certificate and its unconditional delivery. It is admitted that the first step in the transfer, the endorsement of the stock, was accomplished in the presence of the attorney.

Next, the stock appeared in the possession of Velma in the sealed envelope on

which was the endorsement, "The contents of this envelope belong to Velma Stacey—mother Daisy Bernhauer." This is evidence of an actual delivery with the present intention of vesting title in Velma, who retained possession of the certificate until after the death of her mother. See, Hynes v. White, 47 Cal.App. 549, 190 P. 836.

[3] The argument that the stock might not have been in the envelope when the endorsement was placed upon it and that the endorsement might have referred to other papers cannot be controlling and overcome the inferences drawn by the trial judge from the declarations of Mrs. Bernhauer, her endorsement of the certificate, its possession by Velma and the endorsement on the envelope. The argument inferentially charges Velma with fraud if not the commission of a crime,—the withdrawal of the document, originally in the envelope and substitution of the endorsed stock certificate, if not the abstraction of the stock certificate from the possession of Mrs. Bernhauer without her knowledge or consent.

A person is presumed to be innocent of wrong and innocent of crime. Sec. 1963, Code Civ.Proc.; Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269. These presumptions support the inferences of intention to give, and of delivery, which were drawn by the trial judge.

[4, 5] The last sentence of the endorsement cannot overcome these inferences. That sentence might have referred to an understanding between Mrs. Bernhauer and Velma, that Velma would bequeath the stock to Henry. It might have been the expression of a desire on the part of Mrs. Bernhauer that Henry ultimately receive the stock. If we assume that Mrs. Bernhauer had knowledge of the rule of law revoking a gift causa mortis on the death of the donee prior to that of the donor, it might be construed as an attempt to dispose of the stock in that contingency.

Where the language of an instrument is uncertain and its meaning ambiguous, the province of construing it is first presented to the trial judge. The construction placed upon it will not be disturbed on appeal unless it be unreasonable and unjustified. The conclusion of the trial judge that the language used did not show an intent to retain dominion over the stock or to revoke the gift causa mortis is not so unreasonable that it can be disturbed here.

[6, 7] Defendant argues, under the well established rule, that where, as here, there is a confidential relationship existing between an ill mother and a daughter with whom she is living, and the daughter obtains property of the mother to which she asserts title after the death of the mother, there is a presumption of undue influence that will defeat the transaction unless overcome by satisfactory evidence. See Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Carleton v. Bonham, 60 Cal.App. 725, 214 P. 503.

While this rule is well established it is also true that the presumption is rebuttable and may be overcome by circumstantial as well as by direct evidence. We have here only circumstantial evidence tending to rebut the presumption of undue influence. There are the admitted statements of Mrs. Bernhauer that she wanted Velma to have the stock and the advice of her attorney informing her of the legal manner in which the gift could have been consummated. There is the admitted fact that she endorsed the certificate in the presence of her attorney, thereby taking the first step in consummating the gift. There is the further stipulated fact that Velma was in actual possession of the certificate during the lifetime of her mother, coupled with the further fact that this possession was not disturbed by Mrs. Bernhauer during her lifetime. The strongest circumstance is the language used by Mrs. Bernhauer in her endorsement on the envelope that "The contents of this envelope belong to Velma Stacey." This is a declaration of present title that could have been vested in Velma only by prior acts sufficient to complete the gift.

We are of the opinion that these circumstances were sufficient to permit the trial judge to draw the conclusion that Velma had not exerted undue influence on her mother in obtaining the gift of the stock.

The rule governing appellate courts under the circumstances here presented is thus announced in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A.L.R. 123: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial

judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

The judgment is affirmed.

We concur: GRIFFIN, Acting P. J.; THOMSON, Justice pro. tem.




37 Cal.App.2d 575

## CATHEY v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11161.

District Court of Appeal, First District, Division 2, California.

March 1, 1940.

Hearing Denied April 29, 1940.

**1. Municipal corporations ⇐741(1)**

A street car passenger's personal injury action against the city and county of San Francisco which owns and operates street railway in its proprietary capacity was barred by passenger's failure to file with the controller a verified claim for the alleged amount of damages sustained within 60 days after receiving injuries as required by San Francisco charter. St.1935, p. 2421, § 87.

**2. Municipal corporations ⇐741(1), 742(4)**

Where a charter or statute requires a statement of demand to be presented to a municipal officer before suit is filed for damages for personal injuries, such a demand is a "condition precedent" to the suit, and a complaint failing to allege demand fails to plead a cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent."

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by Elizabeth Cathey against the City and County of San Francisco and another for personal injuries. From a judgment sustaining a demurrer to her complaint, plaintiff appeals.

Affirmed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Albert Michelson and A. Don Duncan, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

There is but one question involved in this appeal which we quote in full from appellant's brief: "Is an action for damages, for personal injuries sustained by a passenger on a street car, through the general negligence of the employees of a municipal corporation operating said streetcar on a public street railway, owned and operated by said municipal corporation in its proprietary capacity, barred, solely by reason of said passenger's failure to file with the controller of said municipal corporation, a verified claim for the alleged amount of damages sustained within sixty days after receiving said injuries, as allegedly required by the charter of said municipal corporation?"

[1] Plaintiff sued for personal injuries alleged to have been incurred while she was a passenger on a street car operated by the municipality. A demurrer to her complaint was sustained because she had failed to make demand as required by section 87 of the San Francisco charter. This section, as amended, Statutes 1935, p. 2421, reads:

"Limitation on Claims for Damages

"Section 87. All claims for damages against the city and county must be presented to the controller within sixty days after the occurrence from which it is claimed the damages have arisen. Such claims must be verified by the oath of the claim-

ant and must contain the name and address of the claimant, the date and place of the occurrence or injury for which damages are claimed, the nature and amount of said injuries or damages and the items making up said amount; otherwise there shall be no recovery on any such claim or by reason of the said occurrence for which damages are claimed."

[2] The language of the charter section is plain and requires no interpretation or construction. It applies to all claims for damages against the city, and requires a statement of the date and place of the injuries and of their nature and amount. It must be taken as settled law that, when the charter or statute requires such a statement of demand before suit is filed, such a demand is a condition precedent to the action, and a complaint failing to allege demand fails to plead a cause of action. Crim v. San Francisco, 152 Cal. 279, 281, 92 P. 640; Geimann v. Board of Police Commr's, 158 Cal. 748, 752, 112 P. 553; Douglass v. City of Los Angeles, 5 Cal.2d 123, 130, 53 P.2d 353; Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 580, 59 P.2d 104; Farmers & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 659, 91 P. 795; Continental Insurance Co. v. Los Angeles, 92 Cal.App. 585, 587, 268 P. 920; Western Salt Co. v. San Diego, 181 Cal. 696, 699, 186 P. 345.

For these reasons the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.




37 Cal.App.2d 470

**PEOPLE v. McVICKER.**

Cr. 2099.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1940.

**1. Criminal law ⇐997**

A defendant, who failed to appeal from a conviction, could not, on motion to vacate judgment, attack that part of judgment of conviction finding him guilty of being an habitual criminal on grounds that accusations of prior convictions were not read to him, that he pleaded to them collectively and not in person, that proof was insufficient to establish prior convictions, and that they did not constitute legal prior felony convictions within the meaning of the statute. St.1929, pp. 380, 384, §§ 1, 3; Pen. Code, §§ 644, 668, 1018, 1025; Cr.Code § 218, 18 U.S.C.A. § 347.

**2. Criminal law ⇐997**

An attack on a judgment of conviction by motion to vacate is a proceeding for a "writ of error coram nobis" whether it be called by that name or not.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Error Coram Nobis".

**3. Criminal law ⇐1202(6)**

Where a defendant was properly convicted on three primary charges of violating the narcotic law and also was adjudged to be an habitual criminal, conviction and sentence for violation of narcotic law was valid, irrespective of validity of conviction for being an habitual criminal. Pen.Code, §§ 644, 668.

**4. Habeas corpus ⇐50**

A defendant convicted of a crime and adjudged to be an habitual criminal on basis of prior convictions may, on expiration of sentence for primary offense attack in a habeas corpus proceeding, legality of his continued confinement on ground that prior convictions were improperly invoked. Pen. Code, §§ 644, 668.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

John Francis McVicker was convicted of violating the Narcotics Act, and for being an habitual criminal. From an order denying defendant's motion to vacate or modify judgment of conviction, defendant appeals.

Affirmed.

John Francis McVicker, in pro per.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

GOODELL, Justice pro tem.

This is an appeal from an order denying a motion to vacate or modify a judgment of conviction—from which no appeal had been taken—which adjudged, inter alia, that appellant was an habitual criminal.

On January 6, 1938, an information was filed in the superior court of Marin coun-

ty charging the appellant in the first count with the sale of morphine, in violation of section 1 of the act entitled: "An act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances, and providing penalties for the violation thereof." Stats.1929, p. 380. The second count charged appellant with having opened and maintained a place in which narcotic drugs were sold, in violation of section 3 of the same act. The third count charged him with possession of morphine, in violation of said section 1.

In each count three prior convictions were alleged, the first, for grand larceny committed in Utah in 1924, the second, for burglary committed in Nevada in 1925, and the third, for a violation of section 218 of the Criminal Code of the United States, 18 U.S.C.A. § 347 (counterfeiting money orders) tried in a federal court in 1928, with the necessary allegations in each case that the appellant had served a term of imprisonment.

When arraigned appellant was represented by counsel, who waived the reading of the information. Later the appellant, through the same counsel, pleaded guilty to the prior convictions and not guilty to each of the three primary accusations, and waived a jury trial. The judge was careful to inquire of the appellant whether he had heard the statement made by his counsel as to the pleas, and he replied that he had, and acknowledged that it was correct. Thereafter, when the case was called for trial, the appellant, through the same counsel, withdrew his plea of not guilty to the accusation of the third count, of possession of morphine, and entered a plea of guilty thereto. Again the judge was careful to inquire of the appellant whether he had heard what his counsel had said, and he replied that he had.

The trial, at which the appellant was represented by the same counsel, resulted in judgments of conviction of the crimes charged in counts one and two. Upon his arraignment for sentence, when asked whether he had any legal cause to show why judgment should not be pronounced against him, appellant replied in the negative. The judgment and commitment contains the following recital: "and said defendant's motion to be adjudged, by the Court, not an habitual criminal, having been denied, defendant having been convicted in this court of the crime of felony—three counts—and having been previously three times convicted, upon charges separately brought and tried, and having served separate terms therefor in state and/or federal penitentiaries for crimes enumerated in Section 644 of the Penal Code of the State of California"; followed by an adjudication that appellant was an habitual criminal and that he be imprisoned in the state prison at San Quentin "for the term prescribed by law, separately, on each of said Counts of said Information * * *".

There was no motion in arrest of judgment, no motion for a new trial and no appeal, so far as this record shows. The commitment was signed by the judge on January 31, 1938, and filed on February 5, 1938. More than a year and five months elapsed after the judgment in this case had become final and the time to appeal had expired, before appellant's motion was filed in the trial court. On or about July 12, 1939, the appellant made a motion in the superior court of Marin county, "to Vacate, Annul, and/or Set Aside and/or Modify" the judgment of January 31, 1938, on the ground that the court was without jurisdiction to pronounce the same. The motion expressly concedes that the conviction upon the three primary accusations, for violations of the narcotic law was proper, but appellant therein urged that he should not have been adjudged an habitual criminal for several reasons: (1) That the accusations of the prior convictions were not read to him as required by section 1025, Penal Code; (2) that he pleaded to them collectively; (3) that he should have pleaded to them in person (sec. 1018, Pen.Code) and not through his counsel; (4) that the prosecution did not make sufficient proof with respect to the alleged prior convictions; and (5) that two of the prior convictions "do not constitute legal prior felony convictions within the meaning of Section 644 and Section 668 of the Penal Code".

The appellant's main points are: (a) That the violation of section 218 of the Federal Criminal Code, 18 U.S.C.A. § 347 (counterfeiting money orders), is not one of the offenses enumerated in section 644 (read in connection with section 668) of the Penal Code; and (b) that the conviction of grand larceny in Utah cannot be used as a basis for adjudging him an habitual criminal because in Utah the crime of grand larceny is committed when the value of the property taken exceeds $50,

whereas in this state the property taken must exceed $200 to make the offense grand theft. These contentions, substantially, formed the basis for the appellant's motion in the trial court, and he presented them there, as he does here, without the aid of counsel. The trial court denied the motion on August 18, 1939, and appellant immediately filed this appeal.

[1, 2] We are satisfied that these questions cannot be reviewed upon their merits in this proceeding. As argued by the attorney-general in his brief, "such questions were ones of issuable fact and mixed law and fact which were before the trial court at the time the judgment was pronounced, and that as a result they could have been raised on a direct appeal from the judgment, had such an appeal been taken". Moreover, it has been held, comparatively recently, that an attack such as this, by motion to vacate the judgment, is, in legal effect, a proceeding for a writ of error, coram nobis, whether it be called by that name or not. People v. Vernon, 9 Cal.App. 2d 138, 141, 49 P.2d 326, citing People v. Mooney, 178 Cal. 525, 174 P. 325, and People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. The case of People v. Moore, 9 Cal.App.2d 251, 49 P.2d 615, is directly in point. The only difference between that case and this is that Moore had first appealed on the merits and upon affirmance of the judgment he petitioned the trial court for a writ of error, coram nobis, from a denial of which petition he then appealed. The point he made in the lower court and on the last appeal was essentially the same as the principal point made by the appellant here, i. e., "that three of the prior convictions with which defendant [Moore] was charged, * * * were not felonies in this state". On Moore's last appeal the appellate court conceded (9 Cal. App.2d page 253, 49 P.2d 615) for the purpose of the case that three of the four prior convictions were not felonies in this state, but nevertheless affirmed the order which had denied Moore's petition, for the reasons and upon the authorities given in that opinion, which need not be repeated herein. The fact that Moore had first appealed from the judgment, and that McVicker had not, does not distinguish the two cases, for on the Moore appeal on the merits (People v. Moore, 137 Cal.App. 130, 30 P.2d 79) although there was testimony from which an inference might have been drawn that the defendant had served time, the point that three out of four of the "priors" charged were not felonies in this state was not touched upon or suggested. The gist of the whole question is summed up in the Moore case, 9 Cal.App.2d 255, 49 P.2d page 617, as follows: "We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea. [Citing authorities.] If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case." In People v. Lumbley, 8 Cal.2d 752, 760, 68 P.2d 354, the Supreme Court follows and approves People v. Moore, 9 Cal. App.2d 251, 49 P.2d 615, supra, adopting the foregoing quotation therefrom.

[3, 4] If neither the federal nor the Utah convictions is available to establish that the appellant is an habitual criminal, the problem presented is that of an excessive sentence, for which the appellant of course has a remedy. Appellant admits that he was properly convicted on the three primary charges of violating the narcotic law. The judgment and sentence, to that extent, is valid in any event. 8 Cal.Jur., pp. 466, 467, sec. 483; In re Morck, 180 Cal. 384, 181 P. 657. If the said two "priors" were improperly invoked,—and on this we express no opinion, for the reason, already indicated, that the question cannot be brought before the court in this form of proceeding,—then upon the arrival of the time when appellant would be entitled to release from confinement for the primary offenses, the legality of his continued or prolonged confinement solely because of the prior convictions can be tested on habeas corpus. 13 Cal.Jur., p. 243, sec. 22; In re Morck, supra; In re Miller, 133 Cal. App. 228, 230, 23 P.2d 1034; see also, cases cited at 6 Cal.Jur. Ten Year Supp., p. 237, sec. 22.

The order appealed from is affirmed.

We concur: PETERS, P. J.; WARD, J.

37 Cal.App.2d 486

**DUNN et al. v. SHAMOON et al.**

**Civ. 2298.**

District Court of Appeal, Fourth District, California.

**Feb. 27, 1940.**

**Hearing Denied April 25, 1940.**

**1. Automobiles ⇐244(18)**

In action to recover damages arising out of collision with truck driven by third party, which collision resulted from turning plaintiffs' automobile to left to avoid striking tire which had fallen from tire rack suspended underneath defendants' truck, evidence supported finding that defendants were negligent in failing to inspect tire rack to ascertain whether employee of tire merchant, who had recently placed tire in tire rack, had properly tightened wing nut holding tire in rack.

**2. Appeal and error ⇐1056(1)**
**Evidence ⇐314(5)**

In action for damages arising out of collision with truck driven by third party, which collision was caused by turning of plaintiffs' automobile to left to avoid striking spare tire which had fallen from tire rack on defendants' truck, testimony that employee of tire merchant who had installed tire in tire rack stated that tire was installed properly, which testimony was sought to be introduced for purpose of showing that statement had been communicated to truck owner, was not inadmissible as "hearsay" but its exclusion was not reversible error, where truck owner did not have as a matter of law right to rely on manner employee had installed spare tire in tire rack.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay."

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Perry R. Dunn and Ella M. Dunn against George N. Shamoon and Y. H. Furubayashi for damages in an automobile collision. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

Iener W. Nielsen and Eckhart A. Thompson, both of Fresno, for appellants.

Glenn M. Devore, and William B. Johnston, both of Fresno, for respondents.

BARNARD, Presiding Justice.

The defendants have appealed from a judgment in favor of the plaintiffs, the action being one for damages resulting from a collision between the respondents' car and a truck owned and driven by a third party.

The facts out of which this action arose are as follows: The respondents were proceeding south on Highway 99 in their automobile. A short distance ahead of them and also proceeding south, was a Chevrolet truck owned by one of the appellants and driven by the other. As the two vehicles were thus proceeding a spare tire and rim, which had been mounted on the tire rack of the Chevrolet truck, suddenly fell from its rack and began bouncing on the pavement a short distance ahead of the respondents' car. Mr. Dunn, who was driving, turned to his left to avoid striking the tire and, in so doing, collided with a Ford truck driven by a third party, which was traveling north on the same highway. The injuries complained of were caused by this collision.

The manner in which the spare tire and rim had been affixed to the Chevrolet truck is disclosed by a photograph and by testimony which appear in the record. It had been suspended underneath the rear part of the frame of the Chevrolet truck, lying on its side with the front edge higher than the rear edge, so that as it lay in the rack it sloped toward the rear. Its front edge rested upon an iron bar which was fixed in place. Its rear and lower edge rested upon another iron bar which was attached to the frame at either end by a bolt, at the lower end of which was a wing nut which could be turned with the fingers. The arrangement was such that when these two wing nuts at the ends of these two bolts were properly screwed up the tire and rim would be held in place underneath the rear of the truck.

Immediately after the accident it was found that the wing nut which had held the right end of the rear iron bar was missing, and the right end of that bar was hanging down about half way to the pavement. The lowering of this rear bar, which had sustained the rear lower edge of the spare tire and rim, had permitted the latter to drop to the pavement.

Five days before this accident a new tire had been mounted on this spare rim and the two had been placed on this tire rack of the Chevrolet truck by an employee of a tire merchant, who was experienced in mounting tires. This was done at night and partly by artificial light. While this tire man remembered that he mounted several tires on this occasion he had no recollection of whether or not he had placed this tire and rim on this truck rack. The appellants testified that during the four years they had owned and driven this truck the spare tire had never before come loose, and the tire man testified that, in his experience, he had never known of a tire falling from this type of rack. There is evidence that after this tire and rim were placed on the tire rack underneath this truck the truck was not used for four days. On the evening before this accident occurred the truck was driven to Oakland and the accident happened the next day, on the return trip. The driver of the truck and his companion testified that nothing had happened on the trip which called their attention to the fact that the spare tire was coming loose, and that nothing had occurred, to their knowledge, which would cause this to happen. However, no one on behalf of the appellants had examined or inspected the manner in which the spare tire and rim were attached to the truck at any time after they were placed thereon.

The appellants first contend that the only duty owed by them to the respondents was the exercise of ordinary care, and that there is no evidence in the record which justifies an inference of negligence on their part. Briefly stated, their contention is that, having employed an admittedly qualified man to install the spare tire and rim on this tire rack they were entitled to rely upon his having done this in a proper manner and that it must be held, as a matter of law, that having thus relied upon the work of an experienced and competent man engaged in such business, no duty rested upon them to examine and inspect the work, in order to see that the same had been properly done. They rely upon Shapiro v. Ingersoll, 11 Cal.App. 2d 202, 53 P.2d 771, a latent defect case, and upon several tail-light cases, including Nelson v. Signal Oil & Gas Co., 10 Cal. App.2d 448, 51 P.2d 885; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, and Yates v. Brazelton, 108 Cal.App. 533, 291 P. 695. In general, these cases hold that the only duty owed is that of ordinary care in making inspections, but they all hold, in effect, that the question of whether the inspection made was reasonable under the circumstances was one of fact.

The complaint in this case charged negligence in general terms, but it is not necessary for the respondents to rely upon the doctrine of res ipsa loquitur since it clearly appears what caused the accident. The falling of the tire was plainly caused by the missing wing nut and the consequent falling down of the iron bar which sustained the rear lower edge of the spare tire and rim. In view of the evidence that such things had not theretofore been known to occur when the wing nuts were properly screwed up, the only reasonable inference is that these nuts had not been properly tightened in this instance.

While it is clear that someone was negligent in this instance, it is equally clear that the only negligence of which the appellants could have been guilty was in failing to use ordinary care with respect to inspecting and examining the manner in which the tire and rim was attached to the truck. The question before us is whether it can be said as a matter of law that no inspection was required under the circumstances here appearing.

[1] Assuming that, in some cases, the work done upon a motor vehicle by an experienced mechanic is of such a nature that the owner and driver thereof is, as a matter of law, justified in relying upon the work done without the necessity for an inspection on his part, this does not seem to be such a case. The manner in which this spare tire and rim were attached to the truck was visible and open and required no great mechanical knowledge to understand. The driver of the truck testified that he had put a spare tire on this rack on many occasions. He must have known, therefore, of the inherent danger that would necessarily exist, when a tire was carried in such a suspended position underneath the rear of the truck, if the wing nuts did not remain properly tightened. These wing nuts were easily moved with the fingers and while the iron bar acted as a spring when the nuts were properly tightened, that very fact would tend to make the nuts work loose if they did not remain so, and as the amount of play increased. In view of the natural danger of such a situation the exercise of reasonable

care would call for the making of at least occasional inspections to see that the nuts were properly tightened. It would not be unreasonable to think that one such occasion should be immediately after a tire had been changed and the spare tire replaced on the rack. In this instance this was done at night, partly by artificial light, and some days elapsed before the truck was used. Whether or not the driver of the truck knew that the spare tire and rim had been remounted his companion, who was also an employee of the owner of the truck, knew that fact. The inherent danger of the situation and the ease with which an inspection could be made are elements that should be considered. In view of all the circumstances, it cannot be said that the exercise of ordinary care did not call for such simple inspections as would have sufficed in this instance. The facts of this case warrant the conclusion that the duty of making reasonable inspections of the parts in question rested upon the appellants, and that the failure to make such inspections constituted negligence. The evidence, with the reasonable inferences therefrom, supports the court's finding of negligence upon the part of the appellants.

[2] The only other point raised is that the court erred in sustaining an objection to a question as to what was said by the man who changed the tires and put this spare tire and rim on the tire rack of this truck, immediately after he had completed that work. An objection that this was irrelevant and immaterial and hearsay, was sustained. The purpose of the question was to show that the tire man had said that the tire was installed all right, with the intention of further showing that this statement was communicated to the owner of the truck. Since the purpose was to show that such a statement had been communicated to the owner, and not the truth thereof, the hearsay rule did not apply. However, the only purpose of this evidence was to support the contention that the appellants were, as a matter of law, justified in relying upon the manner in which the tire man had installed the equipment and that as a matter of law they owed no duty of inspection, and any possible error in this connection could not have been prejudicial.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

37 Cal.App.2d 521

## In re McDONALD'S ESTATE.

## McDONALD v. HEARD et al.

Civ. 2506.

District Court of Appeal, Fourth District, California.

Feb. 28, 1940.

**1. Executors and administrators ⇐216(2)**

An order that attorneys be paid, for extraordinary services rendered to estate in recovering property 35 per cent. of the net value of all properties and moneys recovered, together with accruing rents, issues and profits thereon, was void as too indefinite and as constituting, for practical purposes, a "contingent fee." Probate Code, §§ 910, 911.

See Words and Phrases, Permanent Edition, for all other definitions of "Contingent Fee."

**2. Executors and administrators ⇐216(2)**

The statutory allowance for attorneys' fees in estate proceedings should be a definite, fixed and certain cash allowance, and not a percentage of the value of assets recovered or to be recovered, particularly of assets which are not yet finally part of the estate and might not become or remain part of the estate. Probate Code, §§ 910, 911.

**3. Executors and administrators ⇐97, 216 (2)**

The probate court has authority to authorize administrator to employ counsel and provide that attorneys' fees shall be fixed at a future time upon completion of attorneys' services. Probate Code, §§ 910, 911.

**4. Executors and administrators ⇐216(2)**

The probate court may allow a certain specified sum to be paid for extraordinary services actually performed by counsel for executor or administrator, but may not adopt a formula or measure for determining amount of fees to such counsel at some future time, conditioned upon the happening of a future uncertain contingency. Probate Code, §§ 910, 911.

**5. Judgment ⇐21**

A judgment or decree must be sufficiently definite that it may be enforced and constitute an estoppel between the parties.

**6. Judgment ⇐650**

A judgment becomes "final" when the time for appeal has expired or the appeal is finally determined. Code Civ.Proc. § 1049.

See Words and Phrases, Permanent Edition, for all other definitions of "Final."

**7. Executors and administrators ⇐216(2)**

Whether fees allowed to administrator's attorney are excessive is a matter generally left to sound discretion of probate court, based upon necessity for and nature of litigation, difficulty, amount involved, skill required and employed, attention given, success or failure of efforts, including amount of recovery, and similar considerations. Probate Code, §§ 910, 911.

**8. Executors and administrators ⇐216(2)**

Judgment of the probate court fixing attorneys' fees for extraordinary services will not be interfered with on appeal, unless abuse of discretion clearly appears. Probate Code, §§ 910, 911.

Appeal from Superior Court, Kern County; H. E. Schmidt, Judge.

Proceeding in the matter of the estate of R. McDonald, also known as Ronald McDonald, deceased. From an order allowing attorneys' fees to J. W. Heard, Jr., and others for extraordinary services, Callie I. McDonald, as administratrix of R. McDonald, appeals.

Reversed and remanded.

Ben F. Gray, of Los Angeles, for appellant.

J. W. Heard, Jr., Calvin H. Conron, Jr., and M. G. Brittan, all of Bakersfield, for respondents.

THOMSON, Justice pro tem.

This is an appeal from an order allowing attorneys' fees for extraordinary services in the above entitled estate matter. The respondents filed in said estate matter a petition for attorneys' fees for extraordinary services, praying for an allowance of $40,000 or "forty per cent of the properties and monies" awarded to the estate by a judgment in a superior court action brought by the administratrix against 15 defendants, in which action the administratrix was represented by petitioners as her attorneys. Upon the filing of said petition for attorneys' fees, the administratrix appeared through special counsel and filed objections to any allowance of attorneys' fees for extraordinary services. A hearing was had at which the administratrix was present in person and was represented by said special counsel. Evidence was adduced and the court made an order by which it found that petitioners had successfully maintained said action and a judgment was entered in said case whereby the administratrix recovered nine parcels of real property and certain monies, "together with the rents, issues and profits of said properties thereafter accruing"; that the properties so recovered were appraised in the estate by the inheritance tax appraiser in the sum of $97,852.14, and "against which said several pieces of real property there appears to be debts and delinquent taxes of approximately the sum of $27,000"; that the assets of the estate, other than the properties so recovered, are appraised at $540.50; and that an appeal from said judgment by two of the defendants is pending. In this connection it should be noted that, since the order for attorneys' fees was made, said appeal has been dismissed and said judgment has become final. In the order for attorneys' fees the court included the following provisions: "It is further ordered that M. G. Brittan, J. W. Heard, Jr., and Calvin H. Conron, Jr., are jointly entitled to be allowed and paid for extraordinary services rendered in said action a sum equal to thirty-five per cent (35%) of the net value of all properties and monies, together with the accruing rents, issues and profits thereon and thereof, now recovered or which may be recovered or received and become a part of the above-entitled estate by reason or on account of said action * * * which fee is hereby allowed for the services of said attorneys so rendered to and including the first day of December, 1938, and which said fee the Court hereby determines to be a just and reasonable fee for said services so rendered.

"It is further ordered, adjudged and decreed that the basis for determination of the net value of said properties shall be the net value of the property and/or properties at the time such property and/or properties be finally, in said action, adjudicated a part and parcel of said estate, * * *." Said order sets out a particular description of "the properties and monies" therein referred to, including the following paragraph: "Monies. The sum of $8,142.14 royalty monies paid to and deposited with Anglo California National Bank, Bak-

ersfield Branch, as of October 7, 1938, by Bishop Oil Company, a corporation, pursuant to stipulation and order of court made and entered in said action * * * together with all additional and accruing royalty and/or other monies so paid and deposited subsequent to said October 7, 1938."

The form of order for attorneys' fees is a novel one. No authorities have been cited, nor has the court discovered any, which approve or condemn this method of allowing attorneys' fees in a probate matter.

[1] Appellant first attacks the order allowing attorneys' fees on the ground that the order is ultra vires and void, and in this connection appellant argues that the order is too indefinite and uncertain to be capable of enforcement; and that it is, for all practical purposes, a contingent fee and therefore void. We are in accord with these contentions. Section 910 of the Probate Code provides as follows: "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

The material portion of section 911 of the Probate Code is as follows: "Any attorney who has rendered services to an executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, and upon such notice * * * as the court or a judge thereof shall require, may apply to the court for an allowance upon his fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith."

[2-4] Under the provision of section 911 of the Probate Code respondents had the right to petition the court for an order requiring the administratrix to pay them out of the estate a just and reasonable fee for extraordinary services performed by them for the benefit of the estate, and the court had the jurisdiction to allow such an amount as seemed to the court just and reasonable, such payment to be made forthwith. The final clause of section 911 to the effect that such payment shall be made forthwith has been interpreted to mean that prompt payment should be made when there are available funds in the estate from which the obligation may be satisfied. Zagoren v. Hall, 122 Cal.App. 460, 465, 10 P. 2d 202. It seems obvious from the wording of these sections of the Probate Code, however, that the allowance for attorneys' fees to be made by the court under the code provisions should be a definite, fixed and certain cash allowance, and not a percentage of the value of assets recovered or to be recovered for the estate, particularly of assets which are not yet finally a part of the estate and which might not become or remain a part of the estate, which was the situation in the instant case at the time the order was made. The order appealed from did not actually allow or fix a fee or an amount of compensation as provided in sections 910 and 911 of the Probate Code, but rather adopted a formula or gauge or measure for determining the amount of the fee to be allowed at some future time, perhaps by some other judge, upon the happening of a future, uncertain and speculative contingency, namely a successful termination of the appeal in the action brought by the administratrix for the recovery of property. There is no doubt that the Probate Court has authority to make an order authorizing an administrator to employ counsel and provide that the attorneys' fees shall be fixed at a future time upon the completion of the services. Ludwig v. Superior Court, 217 Cal. 499, 501, 19 P.2d 984. It is also true that the court may allow a certain specified sum of money to be paid for or on account of extraordinary services actually performed by counsel for an executor or administrator, but it is our conclusion that the Probate Court does not have the right to make an order adopting a formula or measure for determining the amount of fees to be allowed to counsel for an executor or administrator at some future time and conditioned upon the happening of a future uncertain contingency, such as was attempted in the present case. Such practice, if indulged in, would be fraught with many uncertainties and would impede the efficient administration of estates.

[5, 6] The order appealed from is uncertain as to the proportion of rents, issues, profits or royalties to be paid to respondents. "A judgment or decree must be

sufficiently definite and certain that it may be enforced, and constitute an estoppel between the parties." 14 Cal.Jur. p. 954; Ellis v. Rademacher, 125 Cal. 556, 559, 58 P. 178. In their brief respondents take the position that the order is definite and certain in this regard because the order "states that the net value of the property and income, less debts, be determined at the time the litigation becomes final". So far as the order relates to the real property which may be recovered, the time for computation is definite, for a judgment becomes final when the time for appeal has expired or the appeal is finally determined. Code Civ. Proc. § 1049; 15 Cal.Jur. p. 122; Baker v. Eilers Music Co., 175 Cal. 652, 655, 166 P. 1006. But what does the order mean with regard to the rents and royalties to be received by the estate? It provides that respondents are entitled to "a sum equal to thirty-five per cent (35%) of the net value of all properties and monies, together with the accruing rents, issues and profits thereon and thereof, now recovered or which may be recovered or received and become a part of the above entitled estate * *." It further provides that "the basis for determination of the net value of said properties shall be the net value of the property and/or properties at the time such property and/or properties be finally, in said action, adjudicated a part and parcel of said estate * * *." The order also sets out a detailed description of the property upon which the purported 35 per cent fee is to be computed, including the following provision: "Monies. The sum of * * * ($8142.14) royalty monies paid to and deposited with Anglo California National Bank, Bakersfield Branch, as of October 7, 1938, by Bishop Oil Company, a corporation, * * * together with all additional and accruing royalty and/or other monies so paid and deposited subsequent to said October 7, 1938". The order seems to distinguish "all properties" from "monies" and from "accruing rents, issues and profits". The paragraph specifying the time for determining the net value is confined to "said properties" and does not expressly include any rents, issues, profits or royalties. Moreover, the paragraph describing the "monies" referred to includes "all additional and accruing royalty and/or other moneys so paid and deposited subsequent to said October 7, 1938". There is no express limitation on the period of time during which the sum equal to 35 per cent of the rents, issues, profits and royalties must be paid by the administratrix to the respondents as a part of their attorneys' fees. The language of the order would not warrant a court in holding that the accumulation of the 35 per cent of such rents, issues, profits and royalties need not continue beyond the time when the action brought by the administratrix will become final, as suggested by respondents. Such uncertainty would make the provisions of the order difficult to perform, for the language could reasonably be interpreted to mean that the payment of 35 per cent of the rents, issues, profits and royalties is a continuing requirement equivalent to a 35 per cent royalty on the lands, as suggested by the appellant in her briefs.

[7, 8] The conclusions we have reached and above expressed render it unnecessary to comment on the objection raised by appellant that the amount of the fee is excessive. We are not passing upon that issue, which is a matter generally left to the sound discretion of the Probate Court, based upon the necessity for and the nature of the litigation, its difficulty, the amount involved, the skill required and employed, the attention given, the success or failure of the attorneys' efforts, including the amount of recovery, and other similar considerations, and, when the Probate Court has made its determination in respect thereto, its judgment will not be interfered with on appeal unless it clearly appears that there has been an abuse of discretion (11B Cal.Jur. p. 506; Estate of Parker, 186 Cal. 671, 672, 200 P. 620); and in some cases a cash fee which might happen to be equivalent to 35 per cent of the value of the property recovered could not be held as excessive.

For the reasons above set forth the order appealed from is reversed and the cause remanded for further hearing.

We concur: BARNARD, P. J.; MARKS, J.

37 Cal.App.2d 565

**LIEBMAN et al. v. CHOYNSKI.**

Civ. 11094.

District Court of Appeal, First District, Division 1, California.

March 1, 1940.

**Judgment ⇐384**

A motion to vacate judgment for defendant, interposed by intervening plaintiffs, who alleged that only a nominal defense had been made to defendant's cross-complaint, and who presented a proposed answer to cross-complaint, putting in issue facts which, if found to be true, would require a different judgment, was properly granted as against demurrer.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by Ben Liebman and others against M. L. Choynski to enjoin defendant from erecting or using any building within alleged restricted tract for commercial purposes, wherein defendant filed an answer and a cross-complaint to quiet title. Judgment was rendered in favor of the defendant. From an order vacating the judgment in response to a motion interposed by Joseph P. Fallon and others, intervening plaintiffs, defendant appeals.

Affirmed.

Tobin & Tobin and George A. Clough, all of San Francisco, for appellant.

Walter E. Drobisch, of San Francisco, for respondents.

WARD, Justice.

This is an appeal from an order vacating a judgment rendered in favor of defendant and cross-complainant upon a motion interposed by six intervening plaintiffs. The history of the litigation will be found in Fallon v. Superior Court, 33 Cal.App.2d 48, 90 P.2d 858, and the points involved in the present appeal were raised and decided in that proceeding except that herein some consideration should be given to the appellant's contention that the moving parties failed to show that a different conclusion would result if the present judgment were set aside and a new trial granted, and that defendant and appellant was not permitted to file an answer to the motion to vacate the judgment.

The motion to set aside and vacate the judgment was accompanied by an affidavit setting forth that interested parties had not been served with summons in the action and had no timely notice of its pendency or of the judgment rendered therein; that the plaintiffs in the suit as originally brought did not represent "in good faith" the parties seeking to set aside the judgment; that the representations made to the court in the trial of the cause were false and untrue and that only a nominal defense to defendant's cross-complaint was presented. In support of the motion, a proposed answer to the cross-complaint, presented and subsequently ordered filed, put in issue the facts in controversy, which, if found to be true, would require a different judgment.

Appellant, the defendant and cross-complainant, did not meet the affidavit in support of the motion to vacate the judgment by a counteraffidavit; instead he filed a demurrer to the motion. Assuming, but not approving, the propriety of testing the sufficiency of the facts alleged in support of the motion, by demurrer, without a countershowing when the demurrer was overruled, it would have been an easy matter to have requested the court to permit the filing of an answer or countershowing to the motion to vacate the judgment instead of appealing within eleven days after the ruling thereon.

The order vacating and setting aside the judgment is affirmed.

We concur: PETERS, P.J.; KNIGHT, J.

100

# CALIFORNIA REPORTER

IN VOLUME

100 PACIFIC REPORTER
SECOND SERIES

15 Cal.2d 206

## SOUTHERN PAC. CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 17394.

Supreme Court of California.

March 12, 1940.

**1. Witnesses ⇐16**

Under the statutes designating clerk of court as the proper official to issue subpœnas and subpœnas duces tecum in absence of provision for any order of court as a basis for the act, clerk of court was authorized to issue a subpœna duces tecum without an order of court. Code Civ.Proc. § 1985; § 1986, subd. 1.

**2. Witnesses ⇐16**

Under statute requiring an affidavit to be filed as a prerequisite to the issuance of a subpœna duces tecum, it is the duty of the clerk to see that an application for subpœna duces tecum is accompanied by an affidavit, but it is not his duty to pass upon its sufficiency. Code Civ.Proc. § 1985; § 1986, subd. 1.

**3. Witnesses ⇐16**

The affidavit setting forth evidence sought and its materiality to issues involved required of one seeking a subpœna duces tecum is not to be passed on by the clerk of court before issuing the subpœna, but is for the court's guidance in event any objection is thereafter made to introduction of such evidence, the subpœna being means whereby evidence is brought into the court. Code Civ.Proc. § 1985; § 1986, subd. 1.

**4. Witnesses ⇐16**

If the opposite party fails to make a motion to recall subpœna duces tecum or is unsuccessful in making such motion and the evidence is brought into court, admissibility of such evidence is to be determined when it is sought to be introduced. Code Civ.Proc. § 1985; § 1986, subd. 1.

**5. Witnesses ⇐16**

Under statute requiring an affidavit of the party desiring the issuance of a "subpœna duces tecum," action of the clerk of court in the issuance of such subpœna is merely ministerial, since the purpose of the subpœna is to initiate proceedings to have the documents and other matters described in the subpœna brought before the court in order that the court may determine whether they are material evidence in the case then pending before it. Code Civ.Proc. § 1985; § 1986, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Subpœna Duces Tecum".

**6. Searches and seizures ⇐7(25)**

The issuance of a subpœna duces tecum pursuant to provisions of the Code of Civil Procedure which is practically identical with rule 45 of the Federal Rule of Civil Procedure, requiring production of private papers or documents, is not violative of constitutional provision which seeks to protect citizen against unreasonable searches and seizures, since, before any such evidence is required to be produced in court, party against whom subpœna is sought to be used, has a right to judicial determination as to whether the matter sought to be produced is material and whether its production in court will violate constitutional rights, and, if he does not avail himself of such rights, he may raise objection when it is sought to admit such evidence. Code Civ.Proc. § 1985; § 1986, subd. 1; Rules of Civil Procedure for the District Courts, Rule 45, 28 U.S.C.A. following section 723c; Const. art. 1, § 19.

**7. Witnesses ⇐16**

A court has inherent power to entertain a motion to quash a subpœna duces tecum and to grant or deny it notwithstanding that there is no statutory provision for such a motion.

---

In Bank.

Application for a writ of prohibition by the Southern Pacific Company to restrain the Superior Court of Los Angeles County from requiring petitioner to obey a subpoena duces tecum.

Writ denied.

W. I. Gilbert, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, Dunn & Sturgeon, of Monrovia, and Betts & Garrison, of Los Angeles, for respondent.

CURTIS, Justice.

By this proceeding, petitioner seeks to prohibit the Superior Court of the County of Los Angeles from requiring petitioner to obey a certain subpoena duces tecum directed to a representative of petitioner in an action entitled, "Raymond Houch v. Southern Pacific Company et al." Said

subpoena was issued by the clerk of said superior court upon the application of the plaintiff in said action, accompanied by an affidavit as required by section 1985 of the Code of Civil Procedure. No order of court was required by the rules of said court for the issuance of a subpoena duces tecum and no order of court was made directing the clerk of said court to issue the said subpoena. Petitioner promptly after the service of said subpoena upon said representative of petitioner, made a motion, upon due notice to the plaintiff in said action, to recall said subpoena, which was denied by said court. Thereupon petitioner instituted this proceeding to prohibit said superior court from requiring the defendants in said action to obey said subpoena. Said subpoena required petitioner to produce, "All the records of said Company relative to those accidents which have occurred on the line of said Company extending from Alhambra, California, to Duarte, California, and running generally through Arcadia and Monrovia, and, particularly, the permanent records of said Company upon which said reports of accidents are itemized, and schedules for the two years last past before the 25th day of February, 1938, and, further, those records which have been made individually by the crew, or members of each crew, where the equipment has been involved in an accident on said line, as above set out, during the last two years heretofore, as indicated."

The main ground upon which petitioner contends that the writ should issue is that said subpoena was issued by the clerk without any order of court directing the issuance thereof by said officer. The law of this state governing the issuance of subpoenas is contained in sections 1985 and 1986 of the Code of Civil Procedure. Section 1985 of the Code of Civil Procedure provides that:

"The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound by law to produce in evidence.

"All applications before trial for subpoenas duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control."

Section 1986 of the Code of Civil Procedure in part reads as follows: "1. A subpoena is issued as follows: To require attendance before a court, or at the trial of an issue therein * * * it is issued by the clerk of the court in which the action or proceeding is pending, under the seal of the court * * *."

[1] It will be noted that no distinction between ordinary subpoenas and subpoenas duces tecum in respect to the person by whom they are to be issued is made by code and the only act required of a party desiring the issuance of a subpoena duces tecum, not required by one desiring the issuance of an ordinary subpoena, is the filing of an affidavit by the applicant as provided by section 1985. In each instance, the clerk of the court is designated as the proper official to issue the subpoena. No provision is made for any order of court as the basis or authority for the act of the clerk in issuing either an ordinary subpoena or a subpoena duces tecum. We, therefore, conclude that the clerk of court was authorized to issue said subpoena without an order of court.

[2] It is contended, however, that the requirement of the code that an affidavit be filed as a prerequisite to the issuance of a subpoena duces tecum necessarily presupposes that a judicial determination as to the sufficiency of the affidavit to warrant the issuance of a subpoena duces tecum will be made before its issuance. While it is the duty of the clerk to see that an application for a subpoena duces tecum is accompanied by an affidavit as required by section 1985 of the Code of Civil Procedure, it is not his duty to pass upon the materiality of the evidence desired to be produced.

While it is true that the affidavit must set forth "in full detail the materiality" of the "matters or things" to the issue involved in the case, we are directed to no authority which makes it the duty of the clerk to pass upon the materiality of such matters. On the other hand, we find it stated upon most respectable authority that, "The approved method of testing the relevancy and materiality of documents required by a subpoena duces tecum is to move, as did appellant here, to quash, vacate or

modify it." Application of Sun-Ray Cloak Co., 256 App.Div. 620, 11 N.Y.S.2d 202, 205. In 70 Corpus Juris, page 55, it is stated: "A witness upon whom has been served a subpoena duces tecum has a right to question the validity of the writ and the duty to produce the papers called for, and where a subpoena has been improperly issued to enforce the production of documents which the witness is not bound to produce, and his rights are invaded by it, he may properly apply to the court, whose duty it would be to enforce the writ, to vacate it or set it aside. The motion or application to set aside or vacate the subpoena gives the court the opportunity to examine the issues raised by the pleadings in the cause, and in the light thereof to determine the apparent relevancy of the evidence which is sought to be elicited, and also to pass upon the question whether an order for the production of the document in question would constitute an unlawful invasion of privacy."

[3-5] In passing upon such a motion, the court would have before it the affidavit and would determine from the matters therein stated whether the evidence sought to be procured thereby was material to the issues in the case. This was the procedure followed in this case by the petitioner herein. Petitioner, as one of the defendants in the case in which the subpoena was issued, moved the court to set aside and vacate the subpoena, which motion the court denied. If this is the accepted procedure in such matters, then we think it is apparent that the statements in the affidavit as to the documents to be produced and their materiality to the issues in the case were not to be passed upon by the clerk before the issuance of the subpoena, but were for the guidance of the court in case any objection was thereafter made to their production or introduction as evidence in the case. The subpoena is merely the means whereby the documents or other things required to be produced are brought into court. Even if the opposite party fails in his motion to recall the subpoena duces tecum, or fails to make such a motion and the documents are brought into court, their admissibility is to be determined when they are offered in evidence. Equitable Life Assurance Society v. Mpasstas, 256 App.Div. 878, 9 N.Y.S.2d 221. The action of the clerk in the issuance of the subpoena duces tecum is merely ministerial as the purpose of the subpoena is to initiate proceedings to have the documents and other matters described in the subpoena brought before the court in order that the court may determine whether they are material evidence in the case pending before it.

[6] It cannot be said that the issuance of a subpoena duces tecum requiring the production of private papers or documents in the manner provided by sections 1985 and 1986 of the Code of Civil Procedure is violative of article I, section 19, of the Constitution of this state, which seeks to protect the citizen against unreasonable searches and seizures. Before any such paper, document, book, or other thing is required to be produced in court, the party against whom it is sought to be used has the right to a judicial determination by the judge before whom the action is pending as to whether the matter sought to be produced is material to the pending case, and also whether its production in court will violate his constitutional rights against unlawful search and seizure. If he desires not to avail himself of this right before the trial of the action commences and prefers to await the time when he is called upon to produce the documents in court, he may then object to their admissibility on the ground of their immateriality or that his constitutional rights are violated by reason of his being compelled to submit them in evidence before the court. It will thus be seen that the party against whom the evidence is offered has ample opportunity to protect all his rights before the court in which the action is pending.

[7] The practice prescribed by said sections of our code is practically the same as that provided by the United States Supreme Court in the recently adopted Rules of Civil Procedure for the district courts of the United States, 28 U.S.C.A. following section 723c. Rule 45 provides that every subpoena may be issued by the clerk under the seal of the court, and, "A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein." In addition thereto this rule provides that the court upon a motion may quash the subpoena if it is unreasonable and oppressive or the court may deny the motion on condition that the person in whose behalf the subpoena is issued advances the reasonable costs of producing the documents. While our code does not provide for such a motion, the court undoubtedly has the inherent power to entertain such a motion, and to grant or

deny it. Application of Sun-Ray Cloak Co., supra. It is hardly to be supposed that the United States Supreme Court would promulgate such a rule if there were any doubt that its enforcement would violate the constitutional rights of any citizen. The section of our state Constitution against unreasonable search and seizure is identical with that of the federal Constitution on the same subject, Const.U.S. amend. 4.

Petitioner has cited a number of authorities in support of the proposition "that it is improper to permit a ministerial officer to pass upon the sufficiency of the affidavit required by section 1985 of the Code of Civil Procedure". We have examined these cases and do not find the above statement to be entirely correct. The authorities cited do, however, at least inferentially, hold that it is improper for a ministerial officer to pass upon the materiality of the evidence required by section 1985 of the Code of Civil Procedure. They are, therefore, in complete harmony with our conclusion in this case as hereinbefore stated.

It is therefore ordered that the petition herein for a peremptory writ of prohibition be and the same is hereby denied, and the alternative writ heretofore issued be and the same is hereby discharged.

We concur: WASTE, C. J.; GIBSON, J.: EDMONDS, J.; SHENK, J.; HOUSER, J.

CARTER, J., deeming himself disqualified, took no part in the consideration or decision of this case.




37 Cal.App.2d 717

## SISCHO v. CITY OF LOS BANOS.

Civ. 6350.

District Court of Appeal, Third District, California.

March 12, 1940.

Hearing Denied May 9, 1940.

**1. Municipal corporations ⇐768(3)**

Where sidewalk on which pedestrian fell was a smooth trowel finished slab of concrete with an almost imperceptible slope of approximately 58/100 of an inch to the foot, city was not subject to imposition of liability, since minor defects in sidewalk are bound to exist and a city cannot be expected to maintain its sidewalks free from all inequalities.

**2. Municipal corporations ⇐768(3), 821(6)**

A city is not necessarily liable for injuries caused by minor sidewalk defects and what constitutes minor defect is not always a question of fact.

**3. Appeal and error ⇐1099(7)**

Where evidence in present record, in action against city for injuries from fall allegedly caused by defective condition of sidewalk, was not substantially different from record on former appeal, in which appellate court reversed judgment for plaintiff, the rule of the "law of the case" was applied, and the judgment for plaintiff was reversed with direction to enter judgment for defendant city.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by L. A. Sischo against the City of Los Banos for injuries from a fall allegedly caused by defect in sidewalk. From a judgment for plaintiff, the defendant appeals.

Reversed, with direction.

Hearing denied; CARTER, J., dissenting.

F. M. Ostrander, of Merced, Cooley, Crowley & Supple, of San Francisco, Chester O. Hansen, of Fresno, S. P. Galvin, of Merced, and Gregory P. Maushart, of Los Banos, for appellant.

C. Ray Robinson, Willard B. Treadwell, and R. R. Sischo, all of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action for personal injuries sustained by plaintiff from a fall in the City of Los Banos. As this is the second time this case has been before us we need not again repeat the facts which are very fully set forth in our opinion in Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P.2d 116, 1020.

Upon the first hearing plaintiff recovered a judgment which was reversed upon various grounds, one of which was that the in-

juries sustained did not arise from, or depend upon any unsafe condition in the sidewalk of the City of Los Banos, but was due to the slipping of the plaintiff upon tiling in a store entrance upon private property.

It was also there held that the change of grade in the sidewalk was so slight that it became a matter of law as to whether or not the city was maintaining a public nuisance, and thirdly, that there was no testimony in the record showing actual notice to the superintendent of streets, whose duty it was to look after and maintain the sidewalks in the City of Los Banos, nor is there anything in the record from which constructive notice might be inferred. The evidence upon this point in the present record is not substantially different from that at the former hearing.

As to the first point in the former decision, that is, that the proximate cause of plaintiff's fall and injury was the slipping on the wet tile entrance to the store, and not upon the sidewalk, the facts now before us are practically the same as then considered, except that in this appeal it was established that an additional 1¼ inches of cement walk lay within the property line of the property owner.

The verified claim of plaintiff upon which this action is based alleged that he was injured "by slipping upon the entrance to the clothing store of F. H. Cronwell—and the public street in front of said clothing store * * *". The trial court found that "plaintiff started to leave said premises by the front entrance; that while on the tile entrance or exit * * * plaintiff's left foot slipped * * *".

The second point determined in the former decision was that even had plaintiff slipped upon the sidewalk, the city could not be held liable therefor, for, as a matter of law, the defect, if any, was so slight that no public hazard was maintained. Upon this question the evidence is the same as in the former trial.

[1, 2] The unchangeable fact remains that the sidewalk in question was a smooth trowel finished slab of concrete with a slope so slight as to be practically imperceptible to a casual observer, being of an average slope of approximately 58/100 of an inch to the foot. Such fact seems to bring this case within the rule laid down in Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, where the court remarked that it was a matter of common knowledge that a sidewalk could not be maintained in perfect condition; that minor defects were bound to exist, and that a city could not be expected to maintain its sidewalks free from all inequalities and from every possible obstruction to travel. A minor defect is not always a question of fact, for otherwise a city could be held liable upon a showing of a trivial defect; also the situation in Stone v. Town of Attleborough, 140 Mass. 328, 4 N.E. 570, is quite similar to the facts here in evidence.

[3] The facts as adduced at the trial in the second action, which is now before us, are practically the same as were before the court in the first appeal. The only material change in the evidence upon the second trial was the fact that the property line in front of the property where the accident occurred, extended from 1¾ inches to 1⅞ inches beyond the line of the tile entrance to the store. In other words, a strip of cement sidewalk of that dimension was within the property line.

Inasmuch as the evidence in the present record is not substantially different from the former record as to any of the principles enunciated by the court, the rule of the law of the case must be applied. Estate of Baird, 193 Cal. 225, 223 P. 974; Hoffman v. Southern P. Co., 215 Cal. 454, 11 P.2d 387; United Dredging Co. v. Industrial Accident Commission, 208 Cal. 705, 284 P. 922.

We do not believe it is necessary to comment upon the objections made to certain findings as being contradictory and insufficient, nor do we need to pass upon the fact as urged by appellant that the final judgment in favor of the street superintendent, dismissing him from the action, was a bar to the recovery against appellant. What we have said as to the law of the case is sufficient to compel this court to direct a judgment in favor of appellant. The judgment is therefore reversed, and the trial court directed to enter judgment in favor of the City of Los Banos.

We concur: THOMPSON, J.; TUTTLE, J.

37 Cal.App.2d 606

## PEOPLE v. JOHNSTON.

Cr. 3277.

District Court of Appeal, Second District, Division 2, California.

March 4, 1940.

Rehearing Denied March 13, 1940.

Hearing Denied April 3, 1940.

**1. Criminal law ⇐661**

The presentation of a criminal case to the superior court upon the transcript of the testimony received at the preliminary examination is condemned.

**2. Criminal law ⇐1023(10, 13)**

Where trial court did not pronounce judgment in prosecution for making and accepting bets on horse races, but suspended the proceedings and placed defendant on probation, purported appeal from judgment of conviction was dismissed, leaving for consideration the order denying defendant's motion for a new trial. Pen.Code, § 337a, subd. 6.

**3. Criminal law ⇐1134(8)**

Trial court's action in overruling defendant's demurrer to information could not be reviewed on appeal, where purported appeal from conviction was dismissed, leaving for consideration only the order denying motion for new trial.

**4. Criminal law ⇐1124(2)**

The District Court of Appeal would not reverse trial court's order denying defendant's motion for new trial, where record failed to show on what ground motion was made.

---

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Carrie Johnston was convicted of making and accepting bets on horse races, and she appeals.

Purported appeal from conviction dismissed, and the order denying a new trial affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Appellant and one Hazel Parker were accused by information of the crime of violating subdivision 6 of section 337a of the Penal Code, in that they "did * * * lay, make, offer and accept a bet and bets and wager and wagers upon the result and purported result of a trial * * * of speed and power of endurance between beasts, to-wit, horses". At a trial before the court without a jury appellant was found guilty. She now appeals from the order denying her motion for a new trial. There is also a purported appeal from the "judgment".

[1] The case was presented to the superior court upon the transcript of the testimony received at the preliminary examination, an unsatisfactory practice which has heretofore been condemned by both divisions of this court. People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142; People v. Newland, Cal.App., 97 P.2d 972. Two police officers testified for the prosecution but no testimony was offered by the defendants. In his brief the attorney general fairly sums up the testimony of officer Durham: "The defendants worked at the Crow's Nest, a cafe and beer parlor at 205 East Vernon avenue, in the city of Los Angeles. On March 1, 1939, William Durham, a Los Angeles police officer, walked into the place and bought a glass of beer. The defendant Mrs. Parker was behind the bar waiting on customers. Some man came in and told Mrs. Parker that he wanted to make a bet with the other lady. He said, 'She don't know me. You know me and you will have to O. K. me'. Mrs. Parker then called the appellant, Carrie Johnston, and told her that she knew this man and that he was O. K. This man gave appellant a dollar and also the name of a horse. She asked some man there, who had a scratch sheet, the number of this horse, and he replied, '729', so she marked that down and then asked the man who had given her the dollar what name he would give and he said 'Edith', and she marked that down on a slip of paper. At this point Police Officer Durham walked up and said he wanted to place one dollar to win on 'Jaw Breaker'. She turned around to the same man as before who had the scratch sheet and asked him what number 'Jaw Breaker' was and he replied '728'. She marked 728 down on a slip of paper and asked the officer his initials and he replied 'WHD'. Then he gave her a dollar bill and followed her back to a pay telephone in the rear where she telephoned and he placed her under arrest. He took from her the dollar bill he had given

her and also a piece of yellow memorandum paper with the marks she had made on it, including the number 729 which he had seen her write, and the number 728 on which he had made his bet. In addition to the scratch sheet from which the numbers of the horses were obtained, the officers found a racing form of March 1, 1939, which was taken from behind the bar. This is People's Exhibit 'C'. When the officer first went in appellant was talking on the telephone and she hung up and came back in the room and 'gave some people some money—different amounts around the room'."

Appellant now charges that the information is faulty in that it "charges more than one offense, as forbidden by section 954 of the Penal Code". She also makes the point that the evidence is insufficient to sustain the conviction. The attorney general contends that there is no merit in either of these points and also contends that the record discloses that appellant is not in position to press them.

[2] The trial court did not pronounce judgment in the present action but suspended the proceedings and placed appellant on probation. Since no judgment was pronounced the purported appeal from the "judgment" must be dismissed, leaving for our consideration the order denying the motion for a new trial. People v. Johnson, 14 Cal.App.2d 373, 58 P.2d 211; People v. Von Eckartsberg, 133 Cal.App. 1, 23 P.2d 819.

[3] Appellant filed a demurrer to the information which was overruled by the trial court. The action of the court in overruling a demurrer can be reviewed in this court only upon an appeal from a judgment. People v. Turner, 39 Cal. 370; People v. Sanchez, 23 Cal.App. 742, 139 P. 820. Since we have before us no appeal from a judgment we cannot consider appellant's attack upon the information. Therefore no occasion arises for discussing the recent decision of the Supreme Court, People v. Pierce, 96 P.2d 784 which is relied upon by the attorney general to sustain the action of the trial court in overruling the demurrer.

[4] There is nothing in the record which would justify a reversal of the order denying the motion for a new trial. The clerk's transcript shows that the motion for a new trial was denied on August 17, 1939. This is the only reference to a new trial to be found in the record, other than that which appears in the reporter's transcript of the proceedings on the same date, when appellant was arraigned for sentence. At that time the court asked if there was any legal cause to show why judgment and sentence should not be pronounced, to which counsel for appellant replied that he "would like to argue it as soon as possible" and that he merely wished to refer the court to two cases. The trial judge stated that a jury was waiting in a case then on trial, whereupon counsel for appellant stated, "If the court please, I will submit the motion that I am making". The court then denied the motion for a new trial. It will be noted that counsel did not state any ground upon which the motion for a new trial was made, and nowhere in the record are we supplied with information on this point. In the absence of such information this court may not reverse the order of the trial court. In People v. McCoy, 71 Cal. 395, 12 P. 272, 274, the court in refusing to review an order denying a motion for a new trial stated that "where such a record fails to disclose the grounds upon which a motion for a new trial was heard and determined, the ruling of the court upon the motion cannot be made the subject of review on appeal". In People v. Skoff, 131 Cal.App. 235, 21 P.2d 118, 120, the trial court had granted a motion for a new trial but the reviewing court in reversing the order held that "since the defendant failed to move for a new trial on the ground of insufficiency of the evidence, the order granting the motion may not be supported on that ground". In People v. Beatcher, 136 Cal.App. 337, 28 P.2d 943, the clerk's transcript showed the following minute order: "Defendant's oral motion for a new trial is denied". The reporter's transcript of the proceedings of the same day showed that counsel for defendant stated: "At this time, may it please the court, I desire on behalf of the defendant, and defendant does, to make oral motion for new trial, on all the statutory grounds, and submit it without argument". The court denied the motion and the reviewing court in affirming the order ruled that: "The bald statement to the trial court that the defendant made his motion for new trial 'on all the statutory grounds', without argument and without suggestion of any definite reason for granting the motion, did not fairly and

reasonably call for decision upon any indicated question in the case".

The purported appeal from the "judgment" is dismissed. The order denying a new trial is affirmed.

We concur: MOORE, P. J.; McCOMB, J.




## COMMERCIAL DISCOUNT CO. v. LOS ANGELES COUNTY et al.*

Civ. 2511.

District Court of Appeal, Fourth District, California.

March 7, 1940.

Hearing Granted May 6, 1940.

**1. Pleading ⇐35**

Where pleader sets forth in his pleading what he either admits or alleges to be the substance or legal effect of an instrument in writing, and in the same pleading sets forth in haec verba the written instrument itself, if the instrument is unambiguous, the matter in the pleading inconsistent with the text of the writing will be treated as surplusage.

**2. Pleading ⇐35**

Where taxpayer in action to recover taxes paid on credits secured by trust receipts made allegations not supported by the terms of trust receipts which were attached to the complaint, and the form of the trust receipt was unambiguous, court would confine itself to consideration of its terms and would disregard the conflicting allegations of the complaint.

**3. Taxation ⇐74**

A trust receipt prepared under the Uniform Trust Receipts Act and given by automobile dealer or trustee to lender to secure repayment of money loaned to trustee to pay for automobile purchased from manufacturer or distributor is not a "note" so as to be exempt from the solvent credits tax, but creates a mere "equitable lien" on the automobile, since the receipt contains nothing that may be construed as an original and unconditional promise to pay a sum of money, but is intended as security for a debt. Civ.Code, §§ 3012-3016.16; Pol.Code, § 3627a; Const. art. 13, §§ 1, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Lien" and "Note."

**4. Chattel mortgages ⇐1**

The Uniform Trust Receipts Act authorizing trust receipts to be given by automobile dealer or trustee to lender or entruster to secure repayment of money loaned to trustee to pay for automobiles purchased from manufacturer or distributor was intended to authorize a manner of giving security for a debt, and not of creating a debt. Civ.Code, §§ 3012-3016.16.

**5. Taxation ⇐74**

Under statutes providing that chattel mortgage may not be given on the stock in trade of a merchant, and that chattel mortgage is void as against "creditors" of the mortgagor and subsequent "purchasers" and "encumbrancers" of the property in good faith and for value unless it is executed in accordance with law, board of supervisors of county seeking to tax debts of taxpayers secured by trust receipts executed under the Uniform Trust Receipts Act as solvent credits were not "creditors", "purchasers", or "encumbrancers". Civ.Code, § 2955, subd. 3; §§ 2957, 2973, 3012-3016.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditors," "Purchasers" and "Encumbrancers."

**6. Chattel mortgages ⇐11**

A chattel mortgage on property upon which the law does not permit such mortgage to be placed is good between the parties. Civ.Code, § 2973.

**7. Chattel mortgages ⇐9, 15, 138(1), 188 (2), 225(1)**
**Taxation ⇐74**

Trust receipts prepared under Uniform Trust Receipts Act and given by automobile dealer or trustee to lender to secure repayment of money loaned to trustee to pay for automobiles purchased from manufacturer or distributor created equitable liens in favor of the lender and were "chattel mortgages" which were void as against creditors, purchasers, and encumbrancers in good faith and for value without notice, but were valid between the parties, and being "chattel mortgages" were exempt from taxation as

*For subsequent opinion see 105 P.2d 115.

"solvent credits". Civ.Code, §§ 2888, 2924, 2955, subd. 3; §§ 2957, 2973, 3012–3016.16; Pol.Code, § 3617, subd. 6; § 3627a; Const. art. 13, §§ 1, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgages" and "Solvent Credits."

Appeal from Superior Court, Los Angeles County; Robert W. Kenney, Judge.

Action by the Commercial Discount Company, a corporation, against the County of Los Angeles and others, to recover certain taxes paid under protest. From a judgment for the defendants, plaintiff appeals.

Reversed.

Chapman & Chapman, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after a demurrer to plaintiff's complaint has been sustained without leave to amend.

Plaintiff is a California corporation engaged in the business of lending money to finance the purchase and sale of automobiles. On March 4, 1936, it owned what were admittedly solvent credits amounting to $3,666,322.76 and had other debts owing to it amounting to $1,611,967.24 which were secured by trust receipts. Defendant Hopkins, assessor of Los Angeles County, assessed all of these credits to plaintiff. Plaintiff paid its tax on the total amount but under protest as to that portion secured by the trust receipts. It filed its verified claim for a refund of that portion of the tax which amounted to $1,611.96. Defendants refused to repay the money to plaintiff and this action to recover it followed.

[1, 2] Plaintiff has attached a copy of its form of trust receipt to the complaint. It has also attempted to plead its construction of the legal effect of the trust receipt, some of which allegations are not supported by the terms of the writing. It is well settled that "when a pleader sets forth in his pleading what he either admits or alleges to be the substance or legal effect of an instrument in writing and in the same pleading sets forth in haec verba the written instrument itself, if the latter is unambiguous, (Silvers v. Grossman, 183 Cal. 696, 701, 192 P. 534), the matter in the pleading inconsistent with the text of the writing will be treated as surplusage". Peak v. Republic Truck Sales Corp., 194 Cal. 782, 230 P. 948; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Bashford v. A. Levy & J. Zentner Co., 123 Cal.App. 204, 11 P.2d 51. As the form of the trust receipt is unambiguous we will confine ourselves to a consideration of its terms and will disregard the conflicting allegations of the complaint.

The trust receipt was evidently prepared under The Uniform Trust Receipts Law as it was originally passed in 1935. Stats. 1935, p. 1930, secs. 3012 to 3016.16, inc., Civ.Code. Under this law a trust receipt was given by the automobile dealer, called the trustee, to the plaintiff, called entruster, to secure repayment by the dealer of money loaned to him by plaintiff, which money enabled him to pay for automobiles purchased from the manufacturer or distributor. The trust receipt recites that the trustee holds in trust for the entruster, as security for payment on demand of a stated amount, certain described motor vehicles in which "a security interest remains in or is hereby transferred to Entruster as security for the payment of the sums mentioned herein, together with interest and charges thereon from date hereof, as agreed". The trustee agrees to hold the motor vehicles in trust as the property of the entruster for the purpose of sale or exchange. The entruster is given the right to insure the motor vehicles against certain named hazards, the premiums to be paid by the trustee and to be secured by the trust receipt until paid. The trustee is prohibited from lending, renting, mortgaging, pledging, encumbering, operating, using or demonstrating any of the motor vehicles but may sell any of them for cash or on terms approved by the entruster and for amounts not less than the amounts due it, the cash and other considerations received to be paid to the entruster. The entruster is given the right to repossess any or all of the motor vehicles upon default by the trustee and to sell them after specified notice of intention to sell. The trust

receipt provides that "the proceeds of any such sale or sales shall be applied, first, to payment of the expenses thereof; second, to the payment of the expenses of retaking, keeping and storing said motor vehicle or vehicles including a reasonable attorney's fee; and, third, to the satisfaction of the Trustee's indebtedness hereby secured. The Trustee shall receive any surplus and shall pay unto Entruster upon demand any deficiency. * * * In the event of default by the Trustee in the payment of any moneys hereunder due on the due date hereof, Entruster may declare all moneys secured immediately due and payable. In event of such default Entruster may at his option and in lieu of sale as hereinabove provided declare a forfeiture of the Trustee's interest in any or all of said motor vehicles against cancellation of the then remaining indebtedness against said motor vehicle or motor vehicles in accordance with the provisions of Section 3016.2 of the Civil Code of the State of California. No waiver of any existing default shall be deemed to waive any subsequent default and all rights hereunder are cumulative and not alternative."

The question to be decided here is the nature of the trust receipt. If it is a note or a chattel mortgage it is exempt from taxation (there having been an income tax in effect in California in 1936) and the demurrer to plaintiff's complaint should not have been sustained without leave to amend. If it is a solvent credit it is taxable and the judgment must be affirmed. Secs. 1, 14, art. XIII, Const.; sec. 3627a, Pol.Code. This question seems to be one of first impression in California.

[3, 4] That the trust receipt cannot be classified as a note seems clear from its terms. It contains nothing that may be construed as an original and unconditional promise to pay a sum of money. Sec. 3082, Civ.Code. Its language is appropriate in an instrument which gives security for a debt. Further, The Uniform Trust Receipts Law, under which the trust receipt was prepared, clearly was intended to authorize a manner of giving security for a debt and not of creating a debt.

We have found but one case commenting on The Uniform Trust Receipts Law in California. In speaking of trust receipts similar to the one before us, it was said in In re Boswell, D.C. 20 F.Supp. 748, 751:

"Trust receipts have long been independent security devices employed in commercial credit transactions. In re Cattus (C.C.A. 2, 1910) 183 F. 733.

"Their use has become greatly extended in the United States since the automobile has assumed its nationwide and popular proportions in financing and credit requirements for this major industry. In re Bell Motor Co. (C.C.A. 8) 45 F.(2d) 19. So that today these mercantile mediums, because of their beneficial features in quick credit transactions and their frequent judicial concern, have become thoroughly established and identified in business and law. When the term 'Trust Receipt' is used in commerce, the credit and financial agencies of present-day activities associate it with a security instrumentality that resembles a pledge, a chattel mortgage, or a conditional sale contract, but which is exactly none of these mediums of trade and credit. It is a transaction germane to these instrumentalities because it is like them, closely allied and related to them. Some chief differences that readily enter the mind when the term is used include the absence of actual or immediate delivery or change of possession, the removal of notice, recordation or verification requirements, and the retention of title in the vendor."

This decision was approved and the judgment affirmed by the Circuit Court of Appeals. In re Boswell, 9 Cir., 96 F.2d 239. See also, Pacific Finance Corp. v. Hendley, 103 Cal.App. 335, 284 P. 736, 285 P. 1048; Commercial Credit Co. v. Barney Motor Co., 10 Cal.2d 718, 76 P.2d 1181.

There are a vast number of decisions of many courts in the United States dealing with trust receipts. A number of them are cited and discussed in 49 A.L.R. 283 et seq., 87 A.L.R. 305 et seq., and 101 A.L.R. 453 et seq.

Originally the trust receipt came into use in transactions involving the importation of goods from foreign countries. While the decisions disclose many variations in the original transactions the following may generally illustrate the practice: The importer would have the goods consigned to a bank and the bill of lading would be delivered to it. When the importer executed a trust receipt, the bank would either deliver the bill of lading, or

the goods, or both, to him. The trust receipt would either permit title to remain in the bank or give it a lien on the goods until its bill was paid. It would give the importer possession of the property and the right to manufacture and sell, or to sell, title to the proceeds or a lien on them to be retained by the bank. Many courts have called such transactions true trust receipts transactions.

With the increased sales of automobiles, with the need for quick financing, the true trust receipt transaction has been modified. Under this modification the retail dealer purchases his motor vehicles direct from the distributor or manufacturer. He borrows money with which to pay for them from a bank or finance company which has neither actual nor constructive possession of any of them. The debt to the finance company is secured by a trust receipt which is intended to give the lender an equitable lien on the cars. The dealer has possession of them and the right to sell them in the usual channels of trade. This is the transaction we have before us. Plaintiff had neither actual nor constructive possession of any of the automobiles described in the trust receipts.

These two factual situations distinguish many of the cases dealing with trust receipts decided in other jurisdictions. We will confine our citation of authorities to the second type we have described as it presents the factual situation we have before us. The transactions before us merely involved the lending of money to the dealers, repayment of which was secured by the trust receipts. They were clearly intended to create an equitable lien on the automobiles to secure the loans made by plaintiff. See The Uniform Trust Receipts Law, supra.

There have been many decisions in other jurisdictions in which the factual situations were similar to the one before us. The courts are not in agreement on the relationship created between the debtor and creditor by these trust receipts and the exact liens arising from them. See A.L.R. citations, supra. In a majority of the jurisdictions the courts have reached the conclusion that the trust receipts were chattel mortgages. In Re A. E. Fountain, Inc., 2 Cir., 282 F. 816, 821, 25 A.L.R. 319, it was said:

"The trust receipt contains an agreement to hold the goods in trust for the bank and 'as their property.' It starts out with the statement that the bankrupt has set aside the merchandise 'as the property of the said bank,' and concludes with the statement that:

" 'The intention * * * is to protect and preserve unimpaired the title of said bank * * * to the said merchandise and the proceeds thereof.'

"This arrangement seems more nearly to resemble a chattel mortgage than any other form of security."

See, also, In re Schuttig, D.C., 1 F.2d 443; In re Draughn & Steele Motor Co., D.C., 49 F.2d 636; Commercial Inv. Trust Corp. v. Wilson, 6 Cir., 58 F.2d 910; Central Acceptance Corp. v. Lynch, 6 Cir., 58 F.2d 915; McLeod-Nash Motors, Inc., v. Commercial Credit Trust, 187 Minn. 452, 246 N.W. 17, 87 A.L.R. 296; Motor Bankers' Corp. v. C. I. T. Corp., 258 Mich. 301, 241 N.W. 911; General Motors Acceptance Corp. v. Berry, 86 N.H. 280, 167 A. 553; Hartford Accident & Ind. Co. v. Callahan, 271 Mass. 556, 171 N.E. 820; Karkuff v. Mutual Securities Co., 108 N.J.Eq. 128, 148 A. 159, 160; Commonwealth Finance Corp. v. Schutt, 97 N.J.L. 225, 116 A. 722; Habegger v. Skalla, 140 Kan. 166, 34 P.2d 113; Universal Credit Co. v. Reily, 171 Okl. 286, 42 P.2d 516; Universal Credit Co. v. Gasow-Howard Motor Co., Tex.Civ. App., 73 S.W.2d 909.

[5] Subdivision 3 of section 2955 of the Civil Code provides that a chattel mortgage may not be given on "The stock in trade of a merchant". Section 2957 of the same Code provides that a chattel mortgage shall be "void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless" it be executed, acknowledged and recorded in accordance with law. Defendants do not come within the classification of creditors, purchasers or encumbrancers as used in that section.

Section 2973 of the Civil Code provides as follows: "Mortgages of personal property, other than that mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and per-

sons who, before parting with value, have actual notice thereof."

[6] A chattel mortgage on property upon which the law does not permit such mortgage to be placed is nevertheless good between the parties. Bank of Ukiah v. Moore, 106 Cal. 673, 39 P. 1071; Bank of Ukiah v. Gibson, 109 Cal. 197, 41 P. 1008; Tomlinson v. Ayres, 117 Cal. 568, 49 P. 717; McLeod v. Barnum, 131 Cal. 605, 63 P. 924; Perkins v. Maier & Zobelein Brewery, 133 Cal. 496, 65 P. 1030; McRae v. Lackmann, 8 Cal.App. 241, 96 P. 505; Pacific States Corp. v. Pan-American Bank, 213 Cal. 58, 1 P.2d 4, 981.

Section 2888 of the Civil Code provides as follows: "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

Section 2924 of the Civil Code contains the following: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge."

[7] Upon the foregoing authorities we have reached the following conclusions: (1) That the trust receipts created liens upon the automobiles in favor of plaintiff; (2) that these liens must be construed to be chattel mortgages; (3) that although these chattel mortgages were void as against creditors, purchasers and encumbrancers in good faith and for value without notice either actual or constructive, they were valid between the parties; (4) that the attempted transfer of title, if any, to the plaintiff, in the trust receipts which created the liens, were void; (5) that because an income tax law was in force in California in 1936, the trust receipts, being chattel mortgages, were exempt from taxation under the provisions of section 3627a of the Political Code.

Defendants maintain that the property taxed must be classed as solvent credits, and therefore taxable. As we have concluded that the trust receipts are chattel mortgages there can be no merit in this argument under the provisions of subdivision 6 of section 3617 of the Political Code.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



37 Cal.App.2d 551

**JACKSON v. LACY et al.**

**Civ. 2513.**

District Court of Appeal, Fourth District, California.

Feb. 29, 1940.

**1. Limitation of actions ⇐43**

Where guarantor of notes executed mortgage to secure the guarantees and subsequently conveyed the mortgaged land to third person, and mortgagee foreclosed, guarantor's cause of action against mortgagee to obtain judicial application of payment pro rata among the guaranteed notes independently of the foreclosure decree arose, as respects limitations of four years, on date of foreclosure sale. Code Civ.Proc. § 343.

**2. Limitation of actions ⇐124**

Where a defendant is brought into an action for the first time upon the filing of an amended or supplemental complaint, filing of amendment constitutes commencement of the action, as respects limitations running in favor of such defendant. Code Civ.Proc. § 343.

**3. Limitation of actions ⇐103(1)**

Where guarantor of notes executed mortgage to secure the guarantees and subsequently conveyed the mortgaged land to third persons, and mortgagee effected foreclosure, "trust" did not exist either before foreclosure or afterwards, as respects mortgagee's duty of prorating proceeds of foreclosure sale among notes, and hence rule that limitations do not run against trustee until repudiation of the trust was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust."

**4. Mortgages ⇐1**

A "mortgage" is merely an incumbrance created to pay a debt, and not a conveyance in trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage."

**5. Contribution ⇐6**

A party acquires a right of contribution as soon as he pays more than his share, but not until then. Civ.Code, § 1432.

**6. Contribution ⇐1**

The statute giving right of contribution to a joint obligor is based on the principle

of equity that obligor should be reimbursed when he has paid money which in equity and good conscience should be paid by another. Civ.Code, § 1432.

**7. Principal and surety ⇐194(6½)**

A surety has no claim to contribution before he has paid the principal obligation.

**8. Guaranty ⇐105**

Payment by any one other than guarantor in satisfaction of guarantee, even though for guarantor's benefit, would give guarantor no right of contribution as against coguarantors.

**9. Guaranty ⇐105**

Where guarantor of notes executed mortgage to secure the guarantees and subsequently conveyed the mortgaged land to third persons, and mortgagee effected foreclosure, guarantor had no right to contribution against coguarantors, since payment was realized from property not owned by guarantor rather than from guarantor personally.

**10. Pleading ⇐225(1)**

Plaintiff's repeated refusal to amend so as to cure defects of uncertainty and ambiguity was of itself grounds for sustaining demurrer without leave to amend.

**11. Pleading ⇐225(2)**

It is not an abuse of discretion to refuse to allow further amendments after demurrer has been sustained to a second amended and supplemental complaint.

**12. Appeal and error ⇐2**

The statute authorizing review of order sustaining demurrer without leave to amend, even though no request to amend was made, was inapplicable to action pending when such statute was enacted. Code Civ.Proc. § 472c, as added by St.1939, p. 2235.

**13. Action ⇐6**

The purpose of declaratory relief is an eclaircissement or a liquidation of doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation.

**14. Action ⇐6**
**Limitation of actions ⇐178**

A general prayer for declaratory relief in amended complaint added nothing to guarantor's cause of action for contribution, where complaint alleging such cause of action was demurrable on ground of bar by limitations and lack of right to contribution.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by H. R. Jackson as substituted plaintiff for N. W. Stowell, against Emma L. Lacy, executrix of the estate of William Lacy, deceased, and others, to enforce contribution for payments allegedly made by plaintiff on joint guarantee by plaintiff and named defendant's testator. From a judgment for defendants, plaintiff appeals.

Affirmed.

P. E. Keeler and Raymond V. Haun, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent Emma L. Lacy.

Lawler & Felix, of Los Angeles, for respondent Farmers & Merchants Nat. Bank of Los Angeles.

GRIFFIN, Justice.

This is an appeal from a judgment of dismissal after an order sustaining demurrer to amended and supplemental complaint without leave to amend. Plaintiff and appellant, on October 10, 1934, filed an original complaint. Several amendments followed. In the second amended complaint denominated "Complaint to Establish Claim, to Sequester Funds and for Declaratory Relief", filed on January 13, 1937, the Farmers & Merchants National Bank of Los Angeles, a banking corporation, hereinafter referred to as the bank, was, by order of court, made a party defendant. After the interposition of demurrers by both defendants, and following an amendment to the second amended complaint, the court sustained the several demurrers without leave to amend. A judgment of dismissal followed. Plaintiff appealed from the judgment. The second amended complaint alleges generally that on May 20, 1930, the Whitlock Manufacturing Company, a corporation, made, executed and delivered to the Farmers & Merchants National Bank of Los Angeles a certain 30-day promissory note in the sum of $25,000, which note contained an endorsement and guarantee by N. W. Stowell, together with William Lacy and one F. V. Gordon; that thereafter on the 25th day of September, 1931, a suit was filed in the Superior Court of Los Angeles County by the Farmers & Merchants Na-

tional Bank of Los Angeles against N. W. Stowell upon certain promissory notes hereinafter mentioned, including said note for $25,000, said action being numbered 328288; that one of said notes was for the principal sum of $95,775.26, dated February 18, 1931, due 30 days after date, and was executed by and was the personal and principal obligation of N. W. Stowell; that upon each of the other notes above mentioned, Whitlock Manufacturing Company was the maker and the amount, date and maturity of each of said notes, together with the guarantee upon each, are as follows, to wit:

| Amount | Date | Maturity |
|---|---|---|
| $ 50,000.00 | Dec. 16, 1929 | 90 days |
| $ 50,000.00 | Dec. 20, 1929 | 90 days |
| $ 44,350.00 | Jan. 11, 1930 | 90 days |
| $ 50,000.00 | Jan. 15, 1930 | 90 days |
| $ 5,650.00 | Feb. 5, 1930 | 90 days |
| $100,000.00 | Feb. 7, 1930 | 90 days |
| $ 50,000.00 | Feb. 7, 1930 | 90 days |
| $ 25,000.00 | Mar. 27, 1930 | 90 days |
| Guaranteed by N. W. Stowell | | |
| $ 25,000.00 | Apr. 14, 1930 | 90 days |
| Guaranteed by F. V. Gordon and N. W. Stowell | | |
| $ 25,000.00 | May 20, 1930 | 30 days |
| Guaranteed by N. W. Stowell, F. V. Gordon and William Lacy | | |
| $ 13,000.00 | June 20, 1930 | 90 days |
| Guaranteed by W. J. Pearson and N. W. Stowell. | | |

The second amended complaint further alleges that the interest on all of said notes executed by Whitlock Manufacturing Company at the time of the commencement of said action by said bank against said N. W. Stowell was paid down to the 6th day of May, 1931, and there was remaining due and unpaid on said individual note of said N. W. Stowell the sum of $27,603.12; that prior to the execution of any of said notes said N. W. Stowell, together with E. D. Reiter, H. S. Haffer and H. P. Usher, executed and delivered to said Farmers & Merchants National Bank of Los Angeles their joint and several guaranty in writing, dated December 7, 1929, wherein and whereby they and each of them guaranteed to said bank the prompt payment of all indebtedness which said Whitlock Manufacturing Company did then or at any time thereafter might owe to said bank up to, but not to exceed the sum of $350,000, which said written guaranty continued in full force and effect at all times from and after the date thereof; that on April 7, 1930, said N. W. Stowell and his wife executed and delivered to said Farmers & Merchants National Bank of Los Angeles an instrument in writing in form a grant deed, but actually intended as a mortgage, wherein and whereby said guarantors conveyed to said bank legal title to certain real property in Los Angeles, which said deed was given to secure the obligations and indebtedness of said N. W. Stowell, as evidenced by the promissory notes hereinbefore described; that in said action No. 328288, judgment was duly given and made in favor of the plaintiff therein, said bank, against the original plaintiff herein, N. W. Stowell, for the sum of $514,867.40 on the 27th day of September, 1932, and by said judgment it was further ordered that said deed be foreclosed in the manner provided by law for the foreclosure of mortgages on real property, and that the proceeds derived from the sale thereof should be applied in the satisfaction and/or reduction of the amount due thereon; that thereafter such proceedings were had pursuant to said judgment; that the real property was sold on November 15, 1932, at public sale for the sum of $400,000 and after deducting therefrom the fees, etc., amounting to $466.50, the balance of said purchase price remaining, to wit, the sum of $399,533.50 was applied upon said judgment, leaving a balance at that time of $120,740; that on August 10, 1931, Stowell conveyed to Corona Development Co. all his right, title and interest in the property described in the deed to the bank which was being held as security for the loan; that said F. V. Gordon is, and ever since said foreclosure sale has been insolvent and unable to contribute any part of his proportionate share of the principal and interest on said promissory note of $25,000 upon which he, said N. W. Stowell, and William Lacy, now deceased, were coguarantors; that on the 12th day of January, 1933, N. W. Stowell caused to be filed with the defendant Emma L. Lacy, as executrix of the estate of William Lacy, deceased, a creditor's claim, setting out a $130,000 note in addition to the $25,000 note and the guarantee above mentioned, together with the following statement: "The claimant likewise files his claim against this estate for the purpose of charging said estate with all and any legal rights of contribution to which this claimant may be entitled under and by virtue of the above endorsement and guarantee." The claim was rejected on July 10, 1934. The cause

of action on the $130,000 note was dropped from the amended complaint. Plaintiff prays for an order sequestering sufficient funds in the estate of William Lacy, deceased, for the payment of his claim.

For a second clause of action plaintiff alleges that on January 12, 1933, defendant Emma L. Lacy, as executrix of the estate of William Lacy, deceased, approved and allowed the claim of defendant Farmers & Merchants National Bank of Los Angeles for the sum of $25,000 and interest, the same being a claim in due form for the full amount of the note dated May 20, 1930; that an actual controversy exists between the parties hereto with reference to the amount remaining due and unpaid upon said note for $25,000 since the foreclosure sale mentioned in the first cause of action, as well as the amount which the bank is entitled to receive by reason of said promissory note from said executrix, and as to the amount which said executrix can allow and pay upon said claim of said bank; that an actual controversy further exists as to the amount, if any, which said executrix should allow and pay the substituted plaintiff herein upon and by reason of the claim of N. W. Stowell heretofore filed in said estate as hereinbefore alleged, and whether the liability set forth in said claim has now become absolute, and if so, for what amount, by reason of the facts hereinbefore alleged and the law applicable thereto. The prayer for judgment is that the bank be required to prorate the amount received by it upon the foreclosure sale hereinbefore alleged, to wit, the sum of $399,533.50, between each and all of the several notes included in the judgment of foreclosure herein, aggregating the sum of $514,867.40 on the 27th day of September, 1932, and in particular to apply as a credit upon the said note for $25,000, dated May 20, 1930, the proportionate share of the proceeds of said foreclosure sale which the amount due thereon bore to the total amount of said judgment on the 27th day of September, 1932; that the plaintiff's contingent claim hereinbefore referred to be allowed as an absolute claim against the estate of William Lacy, deceased, for one-half of the credit allowed upon said $25,000 note; and that the court declare the rights of the parties hereto in accordance with the facts and the law applicable thereto.

In brief, the plaintiff seeks to establish a claim against the defendant executrix for contribution upon a note executed to the defendant bank by a corporation upon which her testator was a coguarantor with the plaintiff, and upon which the plaintiff claims to be entitled to a credit by reason of a mortgage executed by N. W. Stowell securing his obligation as a guarantor upon this and other notes executed by said corporation maker to the defendant bank, which mortgage was foreclosed by the bank and a sum realized by it thereon which plaintiff claims should be prorated upon all of the obligations so guaranteed and secured.

Respondents, in support of the judgment contend (1) that no cause of action is stated because it is nowhere alleged nor shown that Stowell paid or satisfied the judgment or any part of the indebtedness guaranteed by Stowell, Gordon and Lacy, and that hence no right of contribution in Stowell existed; that the proceeds of the foreclosure sale cannot constitute payment or satisfaction by Stowell, and hence, cannot raise a right of contribution in him, because Stowell, long prior to foreclosure, conveyed the mortgaged property away to a third person; (2) that no cause of action is stated because nothing is alleged entitling plaintiff to application of foreclosure sale proceeds on the note guaranteed by Stowell, Gordon or Lacy; that the law, as applied to the facts set forth, requires application upon other obligations, that is, that the application of payments must be pursuant to the equities of the case; that plaintiff has, and has shown, no equities; that the equities appearing preclude the application sought; (3) that plaintiff's action, as against the bank at least, is barred by the statute of limitations which was one of the grounds of demurrer; (4) that there is a fatal variance between the complaint and the claim filed in the estate of William Lacy, deceased; (5) that the complaint is insufficient for the reason that the allegations are uncertain and ambiguous when tested by both the general and special demurrers and that plaintiff did not, prior to the final order, ask permission to amend the second amended complaint.

[1, 2] First considering the question of the statute of limitations as applied to the claim of relief as against the bank, it will be noted that the original action against the executrix was instituted October 10, 1934. From the pleadings it appears that the bank, after foreclosure of the mortgage (deed) and sale of the property on November 15, 1932, was ordered to apply the proceeds "in the satisfaction and/or reduction of the

amount due. * * *" The specific manner of application of the proceeds, however, is not alleged or disclosed by the pleadings except that they were applied upon the judgment. Hence, if a cause of action ever existed in Stowell against the bank to obtain a judicial application of payments independently of the foreclosure decree, that cause of action arose and came into being on November 15, 1932. As against the bank this action was not commenced until January 13, 1937, when for the first time the bank was made a party by the filing of plaintiff's second amended complaint. It is of course settled that where a defendant is brought into an action for the first time upon the filing of an amended or supplemental complaint, the filing of the amendment constitutes the commencement of the action in so far as such defendant is concerned. The statutory period runs until the time of the filing of the amendment, and if at any time the action is barred, a party thus subsequently brought in may avail himself of the plea. 16 Cal.Jur., p. 545, § 142. Thus it is shown by the amended and supplemental complaint and the record in this action that more than four years elapsed between the time the cause of action, if any, arose, and the time this action was commenced as against this defendant. Hence, plaintiff's action as against the defendant bank is clearly barred. Sec. 343, Code Civ. Proc.; Barnes v. Glide, 117 Cal. 1, 6, 7, 48 P. 804, 59 Am.St.Rep. 153; Grattan v. Wiggins, 23 Cal. 16, 34.

[3, 4] Appellant argues in this connection that the bank was a trustee and that limitations do not run against a trustee until repudiation of the trust. There was no trust either before foreclosure or afterwards. Before foreclosure, the status of a mortgagor-mortgagee was in no sense a trust. And after foreclosure (since there was a deficiency, and the sale price was insufficient to satisfy all the secured obligations) the bank held all of the proceeds of the sale as its own. To these it was entitled at the moment the foreclosure sale was completed. The right to obtain and retain such proceeds was of course an elementary incident of the mortgagee's position. It is to be noted that payment was in fact actually made and applied upon the judgment. A mortgage is merely an incumbrance created to pay a debt and not a conveyance in trust. 41 Cor.Jur., p. 290; 37 Cor.Jur., pp. 905, 907, 908, 909 and 910.

In Navajo-Apache Bank, etc., v. Desmont, 19 Ariz. 335, 170 P. 798, cited by appellant, a mortgage with power of sale had been foreclosed by exercise of the power, and a surplus over and above the amount necessary to satisfy the secured obligation had resulted. The court held that the mortgagee became a trustee as to the surplus so received. In the instant case the Stowell mortgage provided no power of sale. It was foreclosed under decree of court and sale was held by a commissioner. Upon foreclosure there was no surplus but on the contrary there was a deficiency. It is thus obvious that the Navajo-Apache case, supra, can have no application here. Therefore, the demurrer of the bank to plaintiff's second amended complaint and supplemental complaint was properly sustained as to this ground.

[5-7] It is elementary that a party acquires a right of contribution as soon as he pays more than his share but not until then. Richter v. Henningsan, 110 Cal. 530, 537, 42 P. 1077. Section 1432 of the Civil Code provides that "A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." The right given by this section of the code to a joint obligor is based on the principle of equity that when he has paid money which in equity and good conscience should be paid by another, he should be reimbursed therefor. Backer v. Grummett, 39 Cal.App. 101, 178 P. 312. There is no allegation in the complaint that upon any particular method of application of the proceeds of the foreclosure sale the $25,000 note guaranteed by Stowell together with Gordon and Lacy, would have been completely satisfied. The judgment was and ever since has been unsatisfied. At the time the property was taken by foreclosure Stowell had no right, title, or interest in it. Therefore, there would be no right of contribution on the part of Stowell until he had satisfied more than his share of the claim against all (Richter v. Henningsan, supra), and a surety has no claim to contribution before he has paid the principal obligation. 6 Cal.Jur., p. 504, § 5. See, also, Taylor v. Reynolds, 53 Cal. 686, 687; Booth v. Friedman, 82 Cal.App. 174, 255 P. 222; Arp v. Blake, 78 Cal.App. 713, 248 P. 750; Arp v. Blake, 63 Cal.App. 362, 367, 218 P. 773.

In Consolidated Coach Corporation v. Wright, 231 Ky. 713, 22 S.W.2d 108, 111,

it was said: "The cross-petition was demurrable also because it did not show that the petitioner had paid or satisfied any claim arising from the charges against it. * * * There must have been a satisfaction of the judgment before suit can be entertained, as the right of contribution or indemnity rests on the theory of an implied contract and is enforced accordingly. * * * The right of contribution accrues at the time of payment."

[8, 9] Payment by anyone other than Stowell, even though for Stowell's benefit, would give Stowell no right of contribution. San Joaquin Valley Bank v. Gate City Oil Co., 36 Cal.App. 791, 173 P. 781; Worthington v. Keely, 64 Colo. 91, 170 P. 194; De Paris v. Wilmington Trust Co., 7 Boyce, Del., 178, 104 A. 691, 1 A.L.R. 1352; C.Cal. Jur., p. 504, § 5. 6 Ruling Case Law, section 2, pages 1036, 1037, recites the rule: "Contribution presumes the payment and extinguishment of the debt by one for the benefit of all (Dillenbeck v. Dygert, 97 N.Y. 303, 49 Am.Rep. 525), and it has been held that the whole debt must have been paid before the action for contribution could be maintained, though the contrary doctrine has also been laid down. If, however, the party making payment pays no more than his proportion, he cannot recover contribution even though his codebtor has paid nothing. And so, if the payment of the original debt is realized, not from the property of the debtor claiming contribution but from property which he has conveyed, no right to contribution arises."

[10-12] The demurrers, therefore, on this ground were properly sustained. Appellant repeatedly refused to amend his complaint with respect to material allegations which were uncertain and ambiguous and with respect to which both general and special demurrers have been sustained. Possibly plaintiff could have amended to cure the uncertain and ambiguous defects, but his repeated refusal to so amend was of itself grounds for sustaining the demurrer without leave to amend. Billesbach v. Larkey, 161 Cal. 649, 120 P. 31. Plaintiff did not ask permission to amend. He therefore had no positive right to amend his complaint after the demurrer had been sustained to it, and it cannot be held to be an abuse of discretion to refuse to allow further amendments after a demurrer has been sustained to a second amended and supplemental complaint. Billesbach v. Larkey, supra. This action was pending when section 472c of the Code of Civil Procedure was enacted (St.1939, p. 2235) and therefore that section has no application to the instant case.

[13, 14] Declaratory relief has for its purpose an eclaircissement or a liquidation of doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. In view of the opinion expressed as to the above-mentioned grounds for demurrer, the general prayer for declaratory relief in the amended complaint adds nothing to the cause of action. Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 278, 22 P.2d 529. Without deciding the other grounds stated in the demurrers, some of which are meritorious, we are impelled to hold, for the reasons expressed, that the court did not err in sustaining the demurrers without leave to amend.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




37 Cal.App.2d 685

**BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. WEST END CHEMICAL CO. et al. (RYAN et al., Interveners).**

Civ. 11316.

District Court of Appeal, First District, Division 2, California.

March 8, 1940.

Hearing Denied May 6, 1940.

**1. Corporations ⇐151**

Under provision of amended articles of incorporation that right of preferred shares to receive 6 per cent. dividends prior to payment of any dividends upon common shares should be cumulative, the preferred shares were "cumulative" and holders were entitled to receive "cumulative dividends," which entitled holders to dividends for each year following issuance of stock, before dividends could be paid on common stock, the stated provision constituting a "clear and succinct statement" of preference, as required by statute. Civ.Code, § 290, subd. 6, as amend-

ed by St.1915, p. 1481; § 362, subd. 6, as amended by St.1915, p. 1457; § 1641.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative," "Cumulative Dividends" and "Clear and Succinct Statement."

**2. Corporations ⇐151**

Generally, the meaning of the word "cumulative" when used in articles of incorporation describing preferential right accorded to holder of preferred stock, is that the holder is entitled to accumulated dividends on such preferred stock at agreed rate for all years following issuance of preferred stock and without regard to earnings of corporation in any particular year during that period, before any dividend can be paid upon common stock. Civ.Code, § 290, subd. 6, as amended by St.1915, p. 1481; § 362, subd. 6, as amended by St.1915, p. 1457; § 1641.

**3. Contracts ⇐161**

In considering contract as a whole for purpose of placing proper construction on it, including a particular provision thereof, not only must the particular provision be considered in light of all other provisions but all other provisions must be considered in light of the particular provision. Civ.Code, § 1641.

**4. Corporations ⇐151**

Where word "cumulative" is employed in articles of incorporation with reference to preferred right to dividends, the word should be given its ordinary and well understood meaning unless there is other language found in the articles which compels the conclusion that it was not used in that sense. Civ.Code, § 290, subd. 6, as amended by St. 1915, p. 1481; § 362, subd. 6, as amended by St.1915, p. 1457; § 1641.

**5. Costs ⇐172**

Generally, attorneys' fees are not recoverable by successful party in either an action at law or in equity except in certain special instances where the fees are made recoverable by express statutory provision. Code Civ.Proc. § 1021.

**6. Costs ⇐103**

Plaintiffs who brought suit for themselves and for benefit of other owners of preferred shares of corporate stock and who sought only a declaration of respective rights of preferred and common stock to dividends which might subsequently be declared, could not recover attorneys' fees under doctrine allowing such recovery out of a fund where parties prosecuting action recover, protect, preserve or increase the fund for benefit of themselves and others. Code Civ.Proc. § 1021.

**7. Appeal and error ⇐984(5)**
**Costs ⇐103**

Allowance of attorneys' fees under rule permitting such recovery out of a fund in actions in equity where parties prosecuting action recover, protect, preserve or increase the fund for benefit of themselves and others, rests largely in discretion of trial court, and a reviewing court will not reverse portion of judgment denying such recovery unless it clearly appears that trial court abused its discretion. Code Civ.Proc. § 1021.

**8. Costs ⇐172**

In action by preferred stockholders of corporation brought on behalf of themselves and other preferred stockholders for declaration of rights of preferred and common stock to dividends which might subsequently be declared, refusal to allow attorneys' fees to plaintiffs who prevailed in their contention regarding rights of preferred stock was not abuse of discretion under stipulated facts showing that plaintiffs owned approximately 23 per cent. of outstanding preferred stock, that interveners owned more preferred stock than did plaintiffs, that defendants had some interest as owners of preferred stock, and that interveners and defendants employed their own counsel and vigorously opposed plaintiffs' claims. Code Civ.Proc. § 1021.

**9. Costs ⇐172**

Where facts fully warranted trial court's denial of allowance for attorneys' fees to plaintiffs who prevailed in action for declaration of rights of preferred and common stock of corporation to dividends which might subsequently be declared, trial court's refusal to hear evidence relating to nature and reasonable value of legal services performed by plaintiffs' attorneys did not establish contention that trial court failed to exercise its discretion in denying allowance of attorneys' fees. Code Civ.Proc. § 1021.

---

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the Bank of America National Trust & Savings Association and another, for themselves and for the benefit and on behalf of all other owners of preferred shares of capital stock of the West End Chemical Company, against the West End

Chemical Company and others for declaration concerning rights of the owners of preferred and common stock of the West End Chemical Company to receive dividends from the company as a going concern, wherein Earl Ryan and others intervened. From certain portions of the judgment, defendants other than defendants F. W. Weider and Fred G. Stevenot, and the interveners appeal, and from a portion of the judgment, the plaintiffs appeal.

Affirmed.

Louis Ferrari, of San Francisco, Fitzgerald, Abbott & Beardsley, of Oakland, and Aaron N. Cohen, of San Francisco, for plaintiffs, appellants and respondents.

John L. Reith, of Oakland, for defendants, appellants and respondents West End Chemical Co. et al.

Thelen & Marrin, of San Francisco, for defendants, appellants and respondents Ellis et al.

T. P. Wittschen, of Oakland, for interveners, appellants and respondents.

SPENCE, Justice.

Plaintiffs, purporting to act as representatives of themselves and all other owners of preferred stock of the West End Chemical Company, brought this action for declaratory relief. They named as defendants the corporation, the members of the board of directors thereof and certain owners of common stock thereof, the last mentioned defendants being named as representatives of themselves and all other owners of said common stock. A complaint in intervention was later filed by certain persons who owned both preferred and common stock. All parties agreed that a controversy existed as to the rights of the owners of the preferred and common stock, respectively, to receive dividends from said corporation as a going concern and they sought a declaration of said rights. The cause was submitted to the trial court upon stipulated facts.

The trial court entered its judgment as follows:

"1. That each share of preferred stock is entitled to receive dividends amounting to six per cent (6%) of its par value for each year since its issuance, less dividends heretofore paid thereon (which dividends heretofore paid thereon amounted to fifteen per cent (15%) of the par value of each share of preferred stock at the time of the commencement of the action), before any dividends are paid upon any share of common stock. The court does not declare or adjudge, nor does it attempt to declare or adjudge, the rights of the preferred stock in the event of redemption, or the relative rights of either class of stock in the event of dissolution.

"2. Neither plaintiffs nor their attorneys are entitled to any attorneys' fees to be allowed by the court in this action.

"3. Plaintiffs are entitled to their proper costs and disbursements in the sum of $25.-25."

The following appeals were taken: (1) An appeal by the defendant corporation and the defendant members of the board of directors, other than defendants, F. W. Weider and Fred G. Stevenot, from the portions of the judgment found in the paragraphs numbered 1 and 3 therein. (2) An appeal by the defendant common stockholders from the same portions of the judgment. (3) An appeal by the interveners from the same portions of the judgment. (4) An appeal by plaintiffs from the portion of the judgment found in the paragraph numbered 2 therein.

All of said appeals have been presented on a single transcript but each of the appealing groups has appeared by separate counsel and has filed separate briefs. The first three appeals above listed constitute the appeals involving the main question in controversy. Said appeals will be considered together and will be referred to herein as the appeals of defendants and interveners. The fourth appeal above listed involves only the question of counsel fees and will be referred to herein as the appeal of plaintiffs.

Appeals of Defendants and Interveners.

The contentions of the appealing groups in all three appeals of defendants and interveners is that the trial court erred in its declarations of the rights of the owners of the preferred and the common stock, respectively, as found in paragraph numbered 1 in the judgment. The declarations of the trial court, found in said paragraph 1, were in accord with plaintiffs' claims and no question is raised respecting the propriety of the portion of the judgment relating to costs, found in paragraph numbered 3 therein, in the event that the trial court's declarations found in paragraph 1 were correct.

We will briefly summarize the material facts found in the stipulation filed in the trial court. The defendant corporation was organized in 1920. The original articles

of incorporation provided for 3,000,000 shares of common stock having a par value of $1 per share. In 1923, the articles were amended to provide for 5,000,000 shares of stock divided into 3,000,000 shares of common stock and 2,000,000 shares of preferred stock, all shares having a par value of $1 per share. Between 1920 and 1923, the corporation issued 2,012,197 shares of common stock. Between 1923 and 1925, the corporation issued 1,609,241 shares of preferred stock. The foregoing figures represent the amount of stock of each class which was outstanding at the time this action was commenced in 1937. There were then approximately 2,300 preferred stockholders and approximately 2,500 common stockholders. Dividends on the preferred stock had been paid at the rate of 6 per cent in each of the years 1935 and 1936 and at the rate of 3 per cent in the year 1937. No other dividends had been paid on the preferred stock and no dividends had been paid at any time on the common stock. At the time of the commencement of this action, the corporation had an accumulated earned surplus of approximately $400,000 but the board of directors asserted that it would not declare or pay upon the preferred shares any dividend in excess of 6 per cent during any one year until a judicial determination had been had with respect to the respective rights of the common and preferred shareholders to receive dividends. It was stipulated that a controversy existed "as to whether or not the shares of preferred stock are cumulative and whether the holders thereof are entitled to receive dividends at the rate of six per cent (6%) per annum for each year since the date of the issuance thereof (less the fifteen per cent (15%) aggregate dividends heretofore declared and paid thereon) before any dividends can be declared or paid on the common stock."

The parties were further agreed upon the proposition that the respective rights of the two classes of stockholders depended upon the contract of the parties, which in this instance consisted of the amended articles of incorporation (the preference provisions of which were carried into the stock certificates issued to the owners of the preferred stock), and the statutory provisions which were in force at the time and became a part of the contract.

The preference provisions of said amended articles of incorporation read as follows:

"Of the said five million (5,000,000) shares, three million (3,000,000) shares shall be common stock, and two million (2,000,000) shares shall be preferred stock having the following preferences, to-wit:

"(a) Said preferred shares to have priority over said common shares to the full par value thereof in the matter of distribution of the assets of this corporation, upon any dissolution or winding up of said corporation.

"(b) Said preferred shares to have priority over said common shares in the distribution of any dividends, to the end that dividends shall be first paid upon said preferred shares to an amount equal to 6% per annum of the par value thereof, before any dividends shall be paid upon said common shares, and the right of said preferred shares to receive such dividends to the amount of said 6% per annum, prior to the payment of any dividends upon said common shares, shall be cumulative.

"(c) In the event that dividends to the amount of 6% are paid upon preferred shares, and thereafter and within the same calendar year, dividends are paid upon common shares up to an amount equivalent to 6% of the par value of said common shares, then thereafter any dividends declared and paid by this corporation within said calendar year shall be applied in equal measure to the subscribed or issued shares of the corporation without distinction between preferred shares and common shares.

"(d) Said preferred shares shall be subject to the right of the corporation to call in and retire all or any of such shares at any time after two years from and after the date of the issuance of original certificate or certificates evidencing such shares, upon payment by the corporation to the stockholders surrendering certificates of preferred shares so called in, of an amount equal to 105% of the par value of such preferred shares so called, as herein provided; and the manner of calling such shares, and the notice to be given, shall be prescribed by the Board of Directors."

The statutory provisions which have been called to our attention are as follows:

Section 290, subdivision 6 of the Civil Code (as it read in 1920 and 1923), provided with respect to capital stock divided into common and preferred that "The articles of incorporation shall also state, in clear and succinct manner, the nature and extent of the preference granted, and except as to the matters and things so stated, no distinction shall exist between said

classes of stock or the owners thereof." Stats.1915, Ch. 743, pp. 1481 and 1482.

Section 362, subdivision 6 of the Civil Code (as it read in 1923 when the articles of incorporation were amended), provided that a corporation might amend its articles of incorporation " * * * to provide for the classification of its capital stock into preferred and common shares, in which event there must be set forth * * * a clear and succinct statement of the nature and extent of the preference granted, and except as to the matters and things so stated, no distinction shall exist between said classes of stock or the owners thereof". Stats.1915, Ch. 739, p. 1457.

[1] Our reading of the contract of the parties leads us to the conclusion that "the shares of preferred stock are cumulative" and that the holders thereof are entitled to receive "cumulative dividends", viz.: dividends at the rate of six per cent per annum from the date of issuance before any dividends are paid on the common stock as declared by the trial court in paragraph 1 of the judgment. We believe there is a "clear and succinct statement" of this preference in paragraph b of the amended articles of incorporation where it is provided that "the right of said preferred shares to receive such dividends to the amount of said 6% per annum, prior to the payment of any dividends upon said common shares, shall be cumulative".

The use of the word "cumulative" in such contracts has been quite common for a long period of time and said word has a well understood meaning. In Fawkes v. Farm Lands Investment Co., 112 Cal.App. 374, at page 380, 297 P. 47, at page 50, the court said: "The word 'cumulative,' as commonly used in such contracts, refers to dividends which accumulate only because they have not been earned, or if earned, which have neither been declared nor paid. Cumulative dividends generally signify returns which gather volume by addition—delayed payments on account of anticipated dividends, which, although not presently earned, confer upon the stockholder the contractual right to require payment thereof in full out of future earnings before there can be any dividend on the common stock". See, also, Spear v. Rockland-Rockport Lime Co., 113 Me. 285, 93 A. 754, 6 A.L.R. 793; Knight v. Alamo Mfg. Co., 190 Mich. 223, 157 N.W. 24, 6 A.L.R. 789; Allied Magnet Wire Corp. v. Tuttle, 199 Ind. 166, 154 N.E. 480, 156 N.E. 558, 50 A.L.R. 252; 11 Cornell Law Quarterly, pp. 230, 233–234.

[2] In other words, the ordinary and well understood meaning of the word "cumulative", when used in describing the preferential right accorded to the holder of preferred stock, is that such holder is entitled to accumulated dividends on such preferred stock at the agreed rate for all years following the issuance of such preferred stock, and without regard to the earnings of the corporation in any particular year during that period, before any dividend can be paid upon the common stock. This proposition seems to be conceded by appellants, but they take the position that the preferred stock in question is not a "truly cumulative preferred stock" but is a preferred stock entitled only to certain preferential rights to dividends, not including, however, the right to what is commonly known as "cumulative dividends". The three groups of appellants do not appear to be entirely in accord as to the exact nature and extent of these preferential rights, but we believe that the divergence of opinion among the three groups on this subject results from their respective attempts to give to the word "cumulative" a meaning other than its ordinary and well understood meaning.

[3] Said appellants argue that, in construing the contract here, the amended articles of incorporation must be considered as a whole and in the light of the statutory provisions above set forth. This is conceded by respondents. Said appellants further argue said amended articles do not use the expressions "cumulative preferred stock" or "cumulative dividends"; that under paragraph b the priority conferred upon the preferred stock relates to the "distribution of dividends" rather than to "dividends" and that such priority is expressed as being "to an amount equal to 6%" rather than as being "in the amount of 6%"; that the word "cumulative", appearing in said paragraph b, relates to the "right * * * to receive such dividends" rather than to "dividends"; and that there is no express provision for the payment of arrearages in dividends on the preferred stock in paragraph a, relating to rights on dissolution, or in paragraph c, relating to the respective rights of the parties to dividends when dividends are declared upon the common stock in any year, or in paragraph d, relating to rights on redemption. All of these arguments have been ex-

tensively developed by the various appealing groups and said arguments might be persuasive if the second clause of paragraph b had been omitted. But when considering a contract as a whole for the purpose of placing a proper construction on said contract, including any particular provision thereof, it seems entirely clear that not only must the particular provision be considered in the light of all other provisions but also that all other provisions must be considered in the light of the particular provision. Civil Code, section 1641. If we eliminate from consideration said second clause of paragraph b, it might well be argued that the exact nature of the preference sought to be conferred as to dividends would not be clearly stated as required by statute. But when we take into consideration said second clause, which declares that "the right of said preferred shares to receive such dividends to the amount of said 6% per annum, prior to the payment of any dividends upon said common shares, shall be cumulative", that clause seems to be entirely clear within itself and to clarify any possible doubt which might have otherwise existed, at least with respect to the respective rights of the parties to dividends from the corporation as a going concern. It was only to that extent that the parties sought declaratory relief and the trial court expressly refrained from declaring the respective rights of the parties in the event of dissolution or redemption. We likewise refrain from declaring the last mentioned rights as those questions are not before us on this appeal.

[4] Said appellants concede that they have found no case directly in point sustaining their contentions. This fact is not particularly significant as the preferences sought to be created by articles of incorporation and the language used by the drafters thereof for that purpose vary greatly. But the significant fact is that no authority has been found in which the word "cumulative" had been used in the articles of incorporation with reference to the preferred right to dividends and in which that word has been held to have had a meaning other than its ordinary and well understood meaning. On the other hand, numerous authorities have been cited in which stock has been held to be cumulative preferred stock and entitled to cumulative dividends, as those terms are generally understood, even though the word "cumulative" had not been used in the articles of incorporation. Here the word "cumulative" was used in the articles with reference to the preferred right to dividends. One group of these appellants refers to this language as "unfortunate language" and said group construes it as creating "only a mongrel, ambiguous, cumulative right" differing from the ordinary, cumulative right and giving only the right to accumulations from years in which there were earnings. Another group of these appellants places a construction upon the contract which accords to the preferred stockholders only the rights which they would have admittedly had if the second clause of paragraph b had been entirely omitted. The effect of this construction is to make the preferred stock what is generally understood to be "non-cumulative preferred stock". The third group of these appellants seems to place a construction upon the contract similar to that placed thereon by the group last mentioned but suggests an alternative construction similar to that placed thereon by the group first mentioned. We cannot agree with any of these constructions placed upon the contract by these appellants. We have no doubt that appropriate language could be employed in articles of incorporation to provide for a cumulative right different from the ordinary cumulative right but where, as here, the word "cumulative" is employed in the articles with reference to the preferred right to dividends, we are of the opinion that said word should be given its ordinary and well understood meaning unless there is other language found in said articles which compels the conclusion that it was not used in that sense. We find no other language in the articles before us which compels that conclusion.

Plaintiffs' Appeal.

As above stated, plaintiffs appealed from the portion of the judgment reading "Neither plaintiffs nor their attorneys are entitled to any attorneys' fees to be allowed by the court in this action."

The complaint in this action merely sought a declaration of the respective rights of the preferred and common stock to any dividends which might thereafter be declared. Plaintiffs neither alleged facts sufficient to entitle them to any other relief nor did they pray for any other relief except in the following language: "That because this is a representative or class suit the court fix a reasonable sum as and for attorneys' fees which plaintiffs may incur

herein and declare the same payable by all the owners and holders of shares of preferred stock out of any cumulative dividends that may hereafter be paid by the defendant corporation following the determination of this action."

The main issue in the case was submitted upon a stipulation which set forth the stipulated facts and further provided that in the event that the court indicated its intention to decide said main issue in favor of plaintiffs, said plaintiffs or their attorneys might then be privileged to offer evidence and urge upon the court the contention that reasonable attorneys' fees should be allowed. After the court indicated its intention to decide the main issue in favor of plaintiffs, a further hearing was had and plaintiffs offered to introduce evidence to show the nature and reasonable value of the services rendered by their attorneys. The defendants and the interveners objected to the introduction of said evidence and the trial court sustained the objection and thereafter inserted in the judgment the above mentioned portion from which plaintiffs have appealed.

Plaintiffs contend that the trial court erred in sustaining said objection and in refusing to allow attorneys' fees as requested. We find no merit in this contention.

[5] The general rule in this state is that attorneys' fees are not recoverable by the successful party in either an action at law or in equity except in certain special instances where such fees are made recoverable by express statutory provision. Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847; Bank of America, etc., Ass'n v. Moore, 18 Cal.App. 2d 522, 64 P.2d 460; Code Civ.Proc., sec. 1021; 7 Cal.Jur. sec. 27. There is no express statutory provision allowing the recovery of such fees in actions for declaratory relief or in actions in the nature of representative actions. Furthermore there is no rule to be found in the authorities in this state which will permit the recovery of such fees in an action in equity, as for example an action in interpleader, merely because it might appear just and equitable to allow a recovery of attorneys' fees in such actions. See, Los Angeles Trust & Savings Bank v. Ward, supra.

[6] Plaintiffs seek to bring themselves within an exception to the general rule which apparently permits the recovery of attorneys' fees in certain actions in equity where the parties prosecuting the action recover, protect, preserve or increase a fund for the benefit of themselves and others and in which actions, the recovery is permitted out of such fund. Farmers' & Merchants' National Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867; Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 P. 328; 7 Cal.Jur. secs. 1096–1100; 7 Cal.Jur. 287. We do not believe that the facts before us bring this case within said exception to the general rule. Plantiffs did not allege or prove the existence of any fund which was recovered, protected, preserved or increased by the relief granted in this action. They sought no relief other than a declaration of the respective right of the two classes of stock to any dividends which might thereafter be declared. It is conceded by plaintiffs that it is entirely possible that no dividend will ever be declared out of the existing accumulated surplus and of course it is entirely possible that prudent management and the exigencies of the affairs of the corporation in the years to come may dictate that no further dividend should ever be declared. We find no justification in the authorities in this state for extending the above mentioned exception to the general rule to cover the situation presented here.

[7] But furthermore, we believe that plaintiffs have misconceived the rule applicable in the class of cases coming within the exception to the general rule. We find no authority holding that in cases coming within said exception the plaintiffs are entitled to recover attorneys' fees under all circumstances. On the contrary, the authorities above cited indicate that the allowance of such recovery rests largely in the discretion of the trial court. See, also, Carbon Steel Co. v. Slayback, 4 Cir., 31 F.2d 702; Salmina v. Juri, 96 Cal. 418, 420, 31 P. 365; notes in 49 A.L.R. 1149, and 107 A.L.R. 749, and authorities cited. It therefore follows that even in a case coming within said exception, an appellate court should not reverse the portion of the judgment denying such recovery unless it clearly appears that the trial court abused its discretion.

[8] The stipulated facts show that there were 1,609,241 shares of outstanding shares of preferred stock. Of these, the two named plaintiffs owned 368,192 shares or approximately 23 per cent thereof. The interveners, however, owned 369,422 shares

of said preferred stock, being more than the amount owned by the named plaintiffs. The stipulation also shows that defendant common stockholders "have some interest as owners and holders of preferred stock in the defendant corporation". The record does not disclose the amount of preferred stock owned by said defendants but for aught that appears, all of the remaining preferred stock may have been owned by them. It is true that said interveners and defendants owned more common stock than preferred stock and they therefore vigorously opposed plaintiffs' claims and employed their own counsel for that purpose. Under these circumstances, we find no abuse of discretion in the trial court's denial of a recovery for attorneys' fees for the services performed by plaintiffs' attorneys.

[9] Plaintiffs answer this point by stating that the trial court did not exercise its discretion as it refused to hear any evidence on the subject. The evidence offered by plaintiffs related only to the nature and reasonable value of the legal services performed by plaintiffs' attorneys. The refusal of the trial court to hear such evidence does not indicate that it did not exercise its discretion. All of the other facts above mentioned were before the trial court and said facts fully warranted the denial of an allowance for attorneys' fees, regardless of the nature and reasonable value of said legal services.

From what has been said, we conclude that there was no error in any of the portions of the judgment from which any of these appeals were taken.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




37 Cal.App.2d 528

## WINE PACKING CORPORATION OF CALIFORNIA v. VOSS et al.

Civ. 10761.

District Court of Appeal, First District, Division 1, California.

Feb. 29, 1940.

**1. Partnership ⇐46**

In absence of written partnership articles, existence of copartnership must ordinarily be determined from alleged partners' transactions, conduct and declarations.

**2. Partnership ⇐55**

In action against surviving partner in wine business on account for wine bought by copartner before formation of partnership, evidence of parties' acts and conduct *held* to support court's finding that partnership existed from about alleged date of its formation until death of such copartner.

**3. Partnership ⇐17, 20**

Whether partnership exists is not question of alleged partners' undisclosed intention or even of words used by them.

**4. Appeal and error ⇐996**

Where evidence is susceptible of two constructions, trial court's fact finding, supported by substantial evidence, cannot be disturbed on appeal.

**5. Partnership ⇐73**

One entering into copartnership agreement with one engaged in going wine business did not automatically assume individual liability for such copartner's debt on account for wine bought by him before formation of partnership. Civ.Code, §§ 2411, 2794, subd. 3.

**6. Partnership ⇐73, 239(3)**

Generally, person becoming member of existing partnership or forming partnership with another in such copartner's existing business does not become liable for debts already incurred by copartner, but express or implied agreement is necessary to create such liability between partners as well as between creditors and new firm.

**7. Partnership ⇐73**

A promise by one subsequently entering into partnership with another in wine business to pay balance due on account for wine purchased by copartner before formation of partnership required fresh and independent consideration.

**8. Partnership ⇐73**

In action against surviving member of partnership in wine business on account for wine bought by copartner before formation of partnership, evidence *held* insufficient to support court's finding that defendant promised to pay balance due on account after entering into partnership.

**9. Contracts ⇐71(3)**

A creditor's mere forbearance to sue without agreement to forbear or not given

for debtor's promise to pay debt does not constitute consideration for such promise.

**10. Contracts ⇐73**

As respects consideration, a promise to forbear from suing for amount of debt may be implied as well as express.

**11. Partnership ⇐73**

In action against surviving member of partnership in wine business on account for wine purchased by copartner before formation of partnership, evidence *held* insufficient to support court's finding that defendant promised to pay balance due in consideration of plaintiff refraining from filing action and that plaintiff did so in reliance on such promise.

**12. Partnership ⇐73**

A surviving partner cannot be held liable on account stated for amount due for merchandise purchased by copartner before formation of partnership, in absence of previous monetary transactions or debtor-creditor relationship between such survivor and seller.

**13. Partnership ⇐258(11)**

A corporation, shipping wine sold by it to company in name of which buyer did wine business after he and another formed partnership doing same business under such name, was entitled to judgment against such copartner individually after buyer's death, as well as against partnership property, for price of such wine with interest from time of its delivery.

---

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by the Wine Packing Corporation of California against William Voss and others, as copartners doing business under the name and style of La Colma Wine Company, and William Voss, individually, in which C. H. Mitchell was substituted for one of such other copartners as a defendant. From a judgment for plaintiff against defendant Voss as surviving partner and individually, defendant Voss appeals.

Reversed with directions.

Rosendale & Thomas and John P. Muller, all of Salinas, for appellant.

Jack H. Glines and David F. Hart, both of Santa Maria, for respondent.

GOODELL, Justice pro tem.

This action was brought against the appellant and several fictitious defendants doing business as La Colma Wine Company upon an open book account for goods, wares and merchandise alleged to have been sold and delivered to them at their special instance and request and for which, it was alleged, the defendants promised and agreed to pay. C. H. Mitchell was substituted for one of the fictitious defendants notwithstanding he had died a fortnight before the action was commenced. Judgment was rendered against the appellant William Voss "as a surviving partner of the La Colma Wine Company and individually" for $1,533, the amount sued for, and from that judgment he appeals.

The account was for wine and cooperage bought by said C. H. Mitchell while he was engaged by himself in the wine business in Salinas, during the months of October, November and December, 1936 (except $250 thereof which represented 125 cases of wine at $2 a case, sold and delivered after the partnership was formed). About February 1, 1937, Messrs. Voss and Mitchell, the court found, became partners, and the appellant was held upon the theory that when this partnership was formed he became responsible for the indebtedness of $1,533, the major part of which had been incurred by Mitchell. The liability of an incoming partner is defined by section 2411 Civil Code as follows: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property." This action, however, was not brought under section 2411 with a view to collecting the debt "only out of partnership property", nor was it tried, nor were the findings or judgment drawn, upon that theory. The complaint sought, and the judgment awarded, a money recovery against the appellant, unrestricted by partnership property, and the net result of the trial court's decision is that the appellant, by reason of the partnership relation, was compelled to assume *as a personal obligation* indebtedness contracted by Mitchell some weeks before the partnership was even a subject of discussion.

[1-4] The first point raised by the appellant is that there is not sufficient evidence to support the finding that a copart-

nership existed. There were no written articles, and in such case the existence of a copartnership "must ordinarily be determined from the transactions, conduct, and declarations of the alleged partners". Swanson v. Siem, 124 Cal.App. 519, 523, 12 P.2d 1053, 1055. The following facts appear without conflict: The appellant carried on a beer distributing business in Salinas, and Mitchell opened negotiations about February 1, 1937, by suggesting that he and appellant combine their businesses and carry on together, either as a copartnership or a corporation. When told by Mitchell that his wine business needed about $2,000 more capital, appellant at once wrote his check for $500, a few days later gave Mitchell a further check for $500, and several days thereafter went on a $1,000 note at the bank with Mitchell. No evidence of indebtedness, or security of any kind was given. A commercial account had stood in Mitchell's name, and early in February appellant signed a signature card with Mitchell at the bank for the carrying on of this old account in the new names; checks thereon could be drawn by either of them. During February appellant moved some of his stock of beer into the wine store, and the two parties agreed upon a division of the territory which each should cover in the selling of beer. The wine store had been under lease to Mitchell; a new lease was made as of February 1, 1937, running to C. H. Mitchell and William Voss (without, however, describing them as partners), and appellant promptly started the construction of a warehouse on the leased premises. One of appellant's beer trucks was painted over in the name of La Colma Wine Company and was used in the new enterprise. Mitchell continued in the management of the wine business and appellant did not busy himself very much with it.

We have not by any means attempted to summarize all the evidence upon this subject, but have simply given some of the factors which fairly and reasonably may be taken into consideration in determining whether or not there is a partnership. In addition to those facts there was testimony that Mitchell introduced appellant as his partner, and that after Mitchell's death appellant admitted that he and Mitchell had been partners. Appellant testified that it was the intention of Mitchell and himself to share the profits equally and to form a corporation, each to have an equal number of shares. Indeed they were to have had a meeting on the afternoon of March 17, 1937, to take steps toward incorporating, but Mr. Mitchell died suddenly on the morning of that day.

We are satisfied that the acts and conduct of the parties support the finding that a partnership existed from about February 1, 1937, until Mitchell's death. It is true the appellant testified that there was no intention to form a partnership, at least not until a later time, and it is argued by appellant that the occurrences already related were mere preliminaries; but whether or not there is a partnership is not a question of the undisclosed intention of the parties, or even of the words they use. Black v. Brundige, 125 Cal.App. 641, 645, 13 P.2d 999; Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77, 78. On all the evidence it might well be conceded that the trial court could have found the other way, but in a case such as this, where, to say the least, the evidence is susceptible of two constructions and there is substantial evidence to support the finding made, such finding cannot be disturbed on appeal.

[5, 6] The court made a finding that (with the exception of the said 125 cases of wine sold after February 1, 1937) all the merchandise was sold and delivered to Mitchell between October 16, 1936, and February 1, 1937, and that on or about February 1, 1937, appellant purchased a partnership interest equal to Mitchell's; that the interest acquired by appellant was beneficial to him and "that the said defendant William Voss and the said C. H. Mitchell, as a part of the transaction of acquiring said business of La Colma Wine Company as a copartnership business that the said copartnership did assume and undertake liability for outstanding debts and obligations of the business theretofore conducted by the said C H. Mitchell",—and more particularly the account sued on.

The appellant does not question the finding that the major part of the merchandise had been sold to Mitchell before the partnership, but he does challenge the sufficiency of the evidence to support the remaining parts of the finding.

From a reading of the finding it is clear that the copartnership, and not the appellant, is held to have made the assumption and that the assumption is held to have been made as an "original obligation" (see sec. 2794, Civ.Code), for it

is distinctly said that it was "part of the transaction of acquiring said business". The inquiry, then, should be confined to the circumstances surrounding the formation of the partnership, for it is of that time that the finding speaks, and was doubtless intended to speak. As there were no written articles, no light is to be derived from that source. There could have been no finding, under the evidence, of any active participation by appellant in the making of any promise of assumption for the record shows by uncontradicted testimony that at that time he knew nothing about Mitchell's indebtedness to respondent and nowhere in respondent's brief is any claim made that appellant himself made this promise. If, then, appellant is to be held individually for this antecedent debt because of an assumption made by the *copartnership* and not by himself, it must be on one of two theories: either that he is bound by something said or done by his partner without his knowledge or consent; or that the bare fact that he bought into a going business which owed money, automatically fastened upon him liability for such old indebtedness (payable out of his own pocket and not recoverable only out of partnership property—sec. 2411, Civ.Code).

The latter theory seems to be the one upon which respondent relies, judging by this statement of its position in its brief: "it is respondent's contention that appellant William Voss became obligated to pay the account sued on by the respondent *by reason of his entry into a co-partnership agreement with C. H. Mitchell* * * * under which agreement he became a co-owner of the business * * *" Again respondent claims that appellant became obligated *"by reason of his entrance into a copartnership arrangement"* and that "on coming into the business as a copartner" *appellant "acquired an interest of value, in the property of the La Colma Wine Company, which was sufficient consideration for his individual liability on this obligation* in addition to his joint liability thereon to the extent of the partnership property". (Emphasis ours.)

Not only is no authority cited by respondent to support this theory of automatic assumption, but the authorities are all the other way.

The general rule is stated by Bates, in his Law of Partnership, § 507, as follows: "* * * A person becoming a member of an existing firm, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm but also as between the partners; that is to say, the presumption is against the assumption of such liability, and the burden to prove it is upon the one who asserts it * * *" See, also, Rowley, Modern Law of Partnership, § 270, and Story on Partnership, 6th Ed., § 153.

In a rather old case, Shirreff v. Wilks, 1 East. 48, 102 Eng.Rep. 19,—one essentially parallel to the case at bar—Lord Kenyon says: "It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent if we suffered a new partner to be bound in this manner for an old debt incurred by other persons." Authorities could be multiplied on this subject but it is sufficient to cite an 83-page annotation subjoined to the case of Stephens v. Neely, 161 Ark. 114, 255 S.W. 562, at page 564, at 45 A.L.R. 1236, 1240-1323, and particularly at page 1262. In the Arkansas case the reason for the rule is thus given: "The credit of a new member of a firm does not enter into the consideration of the creditors of the old firm, and it would be manifestly unjust to hold the new partner liable unless he, by an express or implied agreement, assumed the debts of the old firm." Very much to the same effect is Wolff v. Madden, 6 Wash. 514, 33 P. 975. The authorities are numerous to the effect that the mere act of joining or forming a partnership does not automatically fasten liability for an old debt upon the partner who did not contract it, in the absence of statute. Indeed the case of First National Bank v. Simmons and Hall, 98 Cal. 287, 33 P. 197, so holds (citing therein Smith v. Millard, 77 Cal. 440, 19 P. 824; Lindley on Partnership, 2d Am.Ed., marg. 205 et seq.)

As already indicated, and as the language of the finding suggests, respondent relies upon section 2794 Civil Code, which reads: "A promise to answer for the obligation of another * * * is deemed an original obligation of the promisor, and need not be in writing: * * * 3. Where the promise, being for an antecedent obligation of another, is made * *

upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person; * * *". The difficulty is, that there is nothing in this record showing any such original promise by appellant. There is no evidentiary support for the finding just discussed.

[7] The second instance in which the court found an assumption was with respect to the conversation of March 8th,—five weeks after the partnership was formed. Under the holdings in Freeman v. Badgley, 105 Cal. 372, 38 P. 955; Stover v. Stevens, 21 Cal.App. 261, 131 P. 332, and Wood v. Waterman, 102 Cal.App. 516, 283 P. 143, such a promise subsequent to the original transaction would, if made, require a fresh and independent consideration. This finding is barely touched upon in the respondent's brief. In this finding the appellant is held to have personally made the promise. It reads: "that * * * on or about March 8, 1937, the said William Voss did promise and agree with the plaintiff corporation, through its duly and regularly constituted agent, to pay the balance on the aforesaid open book account, upon the consideration that plaintiff execute documents necessary to release from quarantine a certain lot of wine charged to the La Colma Wine Company and constituting an item in the aforesaid open book account; * * * that the said William Voss did then accept the wine so released from quarantine, and did thereupon issue to the plaintiff corporation a check" for $217.37.

[8] The evidence touching this March 8th incident shows a very vague and general "promise" made by *Mitchell,* who had contracted the debt and was already clearly bound to pay it, *and no promise at all made by the appellant.* The vice-president of respondent corporation testified that he called at the wine store on March 8th, at which time appellant was introduced to the witness by Mitchell as Mitchell's partner. Mitchell then said that they were going to join in the wine business, that appellant had $500 in the business, and "with his money and my ability to sell wine, we can go some place, and I hope we can get your account cleaned up right now because we want to buy wine". Mitchell then wanted to know if respondent would release certain wine then quarantined by the state of California and it was agreed that respondent would effect its release if a payment could be made. Thereupon a post-dated check for $217.37, signed La Colma Wine Company, by C. H. Mitchell, was given to respondent's vice-president. The wine was promptly released from quarantine and the check was later dishonored. No claim is made by the respondent's vice-president that he ever talked to appellant about the account until March 22nd, which was two weeks after the conversation in question and five days after Mitchell's death had terminated the partnership. This is all there is in the record touching any promise on March 8th. A more or less general promise was made by Mitchell, but no part was taken in the conversation by appellant except to be introduced as a partner. Unless a promise to answer for Mitchell's debt can be inferred from the fact that appellant was present and heard what Mitchell said with respect to Mitchell's own debt (see Wolff v. Madden, supra, 6 Wash. at page 515, 33 P. 975), then there is no basis whatever for this finding that "on or about March 8, 1937, the said William Voss did promise and agree * * * to pay the balance" of the old account.

The third instance in which the court found an assumption was as follows: "* * that during the fore part of April, 1937, defendant William Voss promised and agreed with the plaintiff corporation, through its duly and regularly constituted agent that in consideration of the plaintiff corporation desisting from and postponing and refraining from the filing of an action against William Voss, surviving partner of the said La Colma Wine Company, and William Voss, individually, that the said defendant William Voss would take care of and pay the above open book account; that it is true that the plaintiff corporation did desist and refrain from filing said suit, in reliance upon said promise of defendant William Voss, at said time as was intended and planned by the officers of the plaintiff corporation." The witness, D. C. Glines, vice-president of respondent corporation, was asked: "Q. Did you have any conversation with him [Voss] subsequent to March 22, 1937", and he answered, "Well, it was some time in April I had a discussion with him" in Attorney Rosendale's office. "Or the end of March". He testified further: "I asked what he was going to do with the account and he said if we would be patient he knew they could work it out and to help out some if we would take back [certain merchandise] * * * and I told him I didn't want to

take it upon myself to say we would take it back unless he would assure me of the balance of the money, and then about that time we were interrupted and came down to see his attorney and then all partnership was denied and when we came out we were not talking any more about it."

W. E. Schlink, president and manager of the respondent corporation, testified that he went to Salinas with D. C. Glines "somewhere around the first or second or third of April, the early part of April"; that he told appellant that he had come purposely to start suit against him as a copartner and that appellant replied: "Schlink, if you will just wait a few more days we are going to begin to get out of the whole thing. I will personally guarantee you, we will take care of your account if you will just be patient and wait a few days". To this Schlink answered: "We have already been very patient with you in the matter of the payment. You have made certain promises. They have not been kept. We can't afford to wait longer. However, if you have any plan you care to submit to us, all right". Appellant then suggested that they go to his attorney's office and discuss his plans, and they did so. The witness was then asked: "Q. Mr. Voss made the statement you said he would take care of the account? A. Mr. Voss agreed that if we would be patient and wait a few more days until they had time to get through with the reorganization of their company, he would personally guarantee payment and see it was paid." On that day they went to the office of appellant's attorney, Mr. Rosendale, and, the witness continued, "we attempted to discuss with Mr. Rosendale the possibility of working out the plan that Mr. Voss had told me that they had in contemplation * * * and Mr. Rosendale refused to enter into much of a discussion regarding it, telling us it would be several days time before anything could be done and suggested to Mr. Voss that he keep in touch with me, or get in touch with me as soon as he, Rosendale, had given him further information regarding the proposed plan. * * * We mentioned to Rosendale that we were willing to wait a few more days because of the fact that Mr. Voss had admitted to me that he would take care of the obligation, and, also because of the fact we had information a co-partnership existed * * *".

The testimony just quoted shows that Mr. Schlink went to Salinas "purposely to start suit" and that it was around the 1st, 2nd or 3rd of April. In 1937, April 1st fell on Thursday, the 3rd on Saturday, and the 5th on Monday. The record shows that the complaint was verified on the 3rd and filed on the afternoon of Monday, the 5th.

[9, 10] In some states it is the law that where there is a request to forbear it is not necessary that such request be accepted, since a unilateral contract, when established by performance, becomes as binding as a bilateral contract; in other words, an agreement by the promisee to forbear is unnecessary (see annotation, 74 A.L.R. 293, 298). The California rule, however, is stated at 6 California Jurisprudence, 173, section 119, as follows: "But the mere forbearance to sue without agreement to forbear, or the mere act to forbearance if not given for the promise, does not constitute a consideration." The rule in California seems also to be the prevailing rule. 74 A.L.R. 293-298. The cases in this state, as elsewhere (74 A.L.R. 301), hold that the promise to forbear may be implied as well as express. Whelan v. Swain, 132 Cal. 389, 64 P. 560; Drovers' Nat. Bank v. Browne, 88 Cal.App. 716, 264 P. 265.

[11] Even under the rule most favorable to respondent that there need be no promise by the creditor to delay or forbear, actual forbearance for a reasonable time is the very minimum that a debtor gets in return for his new promise. In this case the dates speak for themselves in that regard, particularly in view of the fact that the delay requested by appellant was "until they had time to get through with the reorganization of their company" according to respondent's own testimony. Certainly from the testimony of Messrs. Glines and Schlink, it cannot be said that there was an implied promise to forbear for *any* period of time, however short. And if, by any possibility, such implied promise could be found, the precipitate filing of the action shows a breach of such promise. That there was no express promise to delay or forbear for any definite period of time, even an hour, or for a reasonable time, is perfectly clear from the record. Moreover, no such promise (express or implied) on the part of respondent is found to have been made. In the case of Tiffany & Co. v. Spreckels, 202 Cal. 778, 789, 790, 262 P. 742, 747, the court said: "The only possible claim it can make is that it suffered a detriment by forbearing to sue Mrs. Spreckels for the purchase price of the pearls, and agreeing to accept payment of

their purchase price in installments as set out in the writing signed by Spreckels. Had Tiffany & Co. by any valid agreement bound itself not to sue upon its claim against Mrs. Spreckels for a period of time no matter how brief, in consideration of Spreckels agreeing to pay its claim against Mrs. Spreckels, such an agreement on its part would have been sufficient to support Spreckels' engagement to pay their claim. * * * There is no evidence, however, of any such an agreement by Tiffany & Co. The writing of September 20, 1920, was prepared by the solicitors of Tiffany & Co. and contains no references to any engagement by Tiffany & Co. to extend the time of payment of their claim against Mrs. Spreckels or to accept the agreement of the spreckels to pay the same in installments. So far as this writing affected the rights of Tiffany & Co. to proceed against Mrs. Spreckels, it (Tiffany & Co.) could have instituted action the day the writing was signed against Mrs. Spreckels to recover the purchase price of the pearls. The fact that it did forbear to sue without any agreement of forbearance does not constitute a consideration. Estate of Thomson, 165 Cal. 290, 131 P. 1045; Commercial Bank v. Redfield, 122 Cal. 405, 55 P. 160, 772; Shadburne v. Daly, 76 Cal. 355, 18 P. 403." The applicability of this language to the instant case is obvious. Other California cases to the same effect are: Smith v. Compton, 6 Cal. 24; Pacific Imp. Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900; Parrino v. Rallis, 116 Cal.App. 364, 366, 2 P.2d 515. We are satisfied that there is no support in the record for the finding last discussed.

[12] The second count of the complaint alleges that on or about March 21, 1937, an account was stated between plaintiff and the defendants (Mitchell had died four days before) for $1,533, no part of which had been paid. The court found, however, that on or about March 21, 1937, an account was stated, not between plaintiff and defendants as alleged, but between plaintiff and *"William Voss,* surviving partner of the defendant copartnership doing business under the firm name and style of La Colma Wine Company" for $1,533.37. (Emphasis ours.) The case of Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal.App. 559, 97 P. 322, is relied upon by appellant, and the respondent has made no attempt to show that it is inapplicable. Under the doctrine of that case this appellant cannot be held on an account stated unless there had been between him and plaintiff "previous transactions of a monetary character". There had been no debtor-creditor relationship between them before this time (1 Cal.Jur. 191, § 48) and this "cannot be made the instrument to create a liability where none before existed". See, also, Dawson Terminals Co. v. Rosenberg, 63 Cal.App. 489, 491, 218 P. 782; McClenahan v. Keyes, 65 Cal.App. 467, 473, 224 P. 241; Swim v. Juhl, 72 Cal.App. 363, 365, 237 P. 552; Bennett v. Potter, 180 Cal. 736, 746, 183 P. 156.

The appellant presents several other points, among them (a) that there is a fatal variance between pleadings and proof, (b) likewise between pleadings and findings, (c) that the judgment is based upon guaranty or novation, which are without the issues, and (d) certain claimed erroneous rulings in the admission of evidence. It is plain to be seen that it is unnecessary to discuss these points in view of our conclusion that there is no evidence in the record to sustain the findings to the effect that there was an assumption of this indebtedness by the appellant or by the copartnership with his knowledge or consent, and none to sustain the finding of an account stated.

[13] The evidence showed and the court found that *after* Mitchell and Voss had formed their partnership on February 1, 1937, the respondent shipped to La Colma Wine Company 125 cases of wine at $2 a case. Clearly, the respondent is entitled to a judgment against appellant *individually,* as well as against the partnership property, for this $250 (and interest thereon from time of delivery) but, as already indicated, respondent is not entitled to a *personal* judgment against appellant for anything over or above that sum. It was stipulated at the oral argument that the respondent was and is entitled to a judgment against appellant *limited and restricted to its satisfaction only out of partnership property* for the remaining $1,483 (viz., after deducting said $250) together with interest thereon.

The judgment appealed from is reversed with directions to the trial court to make findings and enter judgment thereon in accordance with the views herein expressed. Appellant to recover his costs on appeal.

We concur: PETERS, P. J.; WARD, J.

37 Cal.App.2d 656

**RAY v. FREEMAN et al.**
**Civ. 2518.**

District Court of Appeal, Fourth District, California.

March 7, 1940.

Hearing Denied May 6, 1940.

**1. Corporations ⇐614(5)**

In action for accounting and for dissolution of a newly organized corporation to which the assets of respective businesses of plaintiff and one of defendants were transferred, evidence supported finding that parties intended to provide for an equal division of stock of corporation as Corporation Commissioner might permit to be issued for the assets contributed to the joint business, and not that parties agreed that each should receive one-half of the stated capital stock of 10,000 shares in return for their respective contributions.

**2. Trial ⇐396(4)**

In action for accounting and for dissolution of newly organized corporation to which plaintiff and one of defendants had transferred assets of their respective businesses, wherein trial court found that parties intended to provide for an equal division of corporation's stock in payment for assets contributed to joint business, and for any assets which had accrued to corporation "other than as specific contributions by any of said parties, or by third persons, if any," fact that quoted portion of finding was unsupported by evidence did not affect remaining portion of finding, especially where issuance of stock by corporation to third party, to which plaintiff objected, was not justified by quoted portion of finding.

**3. Appeal and error ⇐161**

Person contributing assets to corporation, who approved corporation's application for permission to issue stock in payment for such assets, which application was filed pursuant to a judgment, and who accepted stock issued, participated in stockholders' meetings, voted the stock and acted as a director, could not appeal from the judgment, since he had accepted benefits of the judgment.

**4. Corporations ⇐97**

In action for an accounting and for dissolution of a newly organized corporation to which plaintiff and one of defendants had transferred assets of their respective businesses, trial court did not commit error in finding that title to assets contributed by parties passed to corporation, although at time of commencement of action Corporation Commissioner had not approved issuance of stock to pay for assets, where approval was obtained after trial but before final judgment, and plaintiff sought only a determination of rights of parties in assets, and an order of distribution, which order was issued and accepted by plaintiff.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Frederick L. Ray against Ralph A. Freeman and others for an accounting and for dissolution of a corporation or a partnership, whichever the court might determine an association to be. From an adverse judgment, plaintiff appeals.

Affirmed.

August J. O'Connor and P. James Kirby, both of Los Angeles, for appellant.

Irl D. Brett, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

The plaintiff had been conducting a certain business and the defendants Freeman had been conducting a similar business. The parties agreed to form a corporation to which the assets of the respective businesses should be turned over and which should thereafter conduct the combined business. To this end a corporation, Master Products Company, Inc., was organized, articles of incorporation being filed on August 27, 1935, which provide for an authorized capital stock of 10,000 shares at a par value of $1 each. Directors were elected and the plaintiff was elected president. The board of directors adopted a resolution accepting the propositions of the plaintiff and of the Freemans, respectively, to assign the assets of the former business of each to the corporation in exchange for 5,000 shares of its capital stock. In accordance with a resolution of the directors an application for a permit to issue such stock was prepared and signed by the officers of the corporation, but was never filed with the commissioner of corporations. However, the assets referred to were turned over by the parties to the corporation which proceeded to operate the combined business, mingling the assets thus acquired, selling parts thereof, buying new materials and creating debts.

As a result of differences which arose between the parties the plaintiff, on May 6, 1936, resigned as president and as a director of the corporation and, on May 28, 1936, this action was brought. The complaint alleged that the parties were operating as a partnership and prayed for a dissolution and accounting. In a second amended complaint a count was added alleging that the parties had organized a corporation and had been operating under the corporate name and title but no stock had been issued; that the plaintiff and the defendants Freeman had contributed certain goods, machinery and money, respectively, for which they each were to receive 50 per cent of any and all stock issued; that the assets so contributed and those since acquired were worth $8,000; and that there was a dispute between them as to whether they were operating as a copartnership or as a corporation. The prayer was that the court determine this question and "on finding it to be either a corporation or a copartnership, that the court decree a dissolution of the same," and that the court decide the relative rights and obligations of the parties and make a distribution of the assets accordingly.

Among other things, the court found that the business was being conducted by a corporation and not by the parties as a copartnership; that the assets which had been turned over to the corporation by the parties had been commingled with other assets which had been acquired; that an application had been prepared asking for permission to issue stock in payment of the assets contributed by the parties, which was to be divided and issued 50 per cent to the plaintiff and 50 per cent to the defendants Freeman; that this application was not filed, which fact was not known to the defendants Freeman until May 16, 1936; that the corporation and the defendants Freeman had never abandoned the intention to apply for a permit for the issuance of stock as thus agreed upon; and that the board of directors of the corporation had authorized a new application for the issuance of said stock, the preparation of which was delayed by the bringing of this action. The court further found: "That irrespective of the present value of the assets of the corporation, it was the intent and purpose of the parties to this action that the stock which the commissioner of corporations shall authorize to be issued for the property contributed to the corporation by the parties to this action and for any assets which have accrued since incorporation (other than as specific contributions, by any of said parties or by third parties, if any) were to be divided and issued 50 per cent to plaintiff and 50 per cent to defendants."

An interlocutory judgment was filed on November 16, 1936, in which it was ordered that the defendant corporation and the defendants Freeman, as a majority of the directors thereof, cause an application to be filed with the commissioner of corporations praying for a permit to issue and sell its capital stock "in such amount as it may be entitled to issue for the contributions to defendant corporation heretofore made by plaintiff, Frederick L. Ray, and by defendants, Ralph A. Freeman, Rufus A. Freeman and Edna E. Freeman, including all accruals thereto, (other than separate contributions made by any party to this action or any other party, or parties, stock for which said contributions need not be divided as herein decreed) and, upon obtaining such permit, that such corporation shall cause to be executed and delivered 50 per cent of the stock so authorized to be issued to plaintiff and 50 per cent thereof to defendants, Ralph A. Freeman, Rufus A. Freeman and Edna E. Freeman, in such proportions as said Freemans shall agree upon; * * *". It was then provided that this judgment should not be entered until sixty days from the date of its filing, whereupon it should be made final if it appeared that the provision for the issuance and delivery of stock had been complied with, and if this was not made to appear within that time, or any extension thereof, the court would make a further order and judgment.

Shortly after that judgment was filed the directors of the corporation authorized an application to the commissioner of corporations for permission to issue and sell 6,420 shares of its stock in exchange for the assets contributed by the parties hereto 3,210 shares to be issued to this plaintiff and 3,210 shares to the Freemans. Such an application was prepared and submitted to the plaintiff's attorney, who approved it and asked that it be put through as soon as possible. This application was approved by the corporation commissioner and in accordance with his permit 3,210 shares of stock were issued to the plaintiff and a like number to the Freemans. The directors of the corporation then sold 500 shares to a man named King and filed a supplemental

application for permission to issue those shares, which was granted by the corporation commissioner. At the request of the plaintiff, a meeting for the election of new directors of the corporation was duly called and held on January 28, 1937. At this meeting the plaintiff protested the right of King to vote the 500 shares which had been issued to him. This protest being overruled, the plaintiff voted his 3,210 shares and elected himself and his attorney as two of the five directors of the corporation. He then participated in the meeting of the board of directors which followed. Thereafter, a final judgment was entered nunc pro tunc as of January 15, 1937, and this appeal is from that judgment.

[1] The appellant's main contention is that the above-quoted finding, to the effect that it was the intent and purpose of the parties that the stock which the commissioner of corporations should authorize to be issued for the property turned into the corporation by the respective parties was to be divided and issued 50 per cent to the appellant and 50 per cent to the respondents Freeman is not supported by the evidence and that the court thus erroneously made a new contract for the parties. It is argued "their actual agreement * * * was that each of the parties was to receive one-half of the total stated capital stock of the corporation, i. e., 5000 shares, in return for their respective contributions". The evidence does not support this contention and this argument. While the appellant in one part of his testimony stated that each of the contributing parties was to receive 5,000 shares of stock if, when and as the corporation commissioner permitted the corporation to issue the same, he further testified, in answer to a question by his own attorney as to the agreement arrived at between him and the Freemans with reference to the valuation of the property they were turning in, that "I had as much as they did in there, and they were willing to split it fifty-fifty. There was no actual value set at all." It was further stipulated at the trial that it was understood by the parties that the issuance of stock in payment for these assets was subject to the approval of the corporation commissioner. There is no evidence that the actual agreement of the parties was that each was to receive one-half of the total capital stock of the corporation, that is, 5,000 shares, in the absence of the approval of the corporation commissioner, and such an agreement, if made, would have been ineffectual. It cannot be assumed, under the evidence, that the parties intended or expected that 5,000 shares would be issued to each of them in the event the value of the assets turned in did not justify the issuance of that amount of stock. In fact the plaintiff alleged in his second cause of action that the assets first contributed by the parties, together with the assets since acquired, were of the value of only $8,000.

[2] Apparently, appellant's real objection to this finding is to the part thereof in parentheses, which reads as follows: "(other than as specific contributions, by any of said parties or by third parties, if any)". It may be conceded that this portion of the finding should have been omitted since there was no evidence of any other contributions by the parties or by third parties, and that the same is superfluous. However, it does not affect the result. Omitting that portion, the finding is that it was the intent and purpose of the parties to provide for an equal division of such stock as the commissioner of corporations might permit to be issued in payment for the assets contributed to the joint business, with any increase thereof. That finding is supported by the evidence and such an agreement is the only one that could have been made in view of the fact that the matter was necessarily subject to the approval of the corporation commissioner.

The appellant's real complaint is that after the trial 500 shares of stock were sold and issued to a third party. Nothing in the finding complained of enabled this to be done and it would have been equally possible had the portion contained in the parentheses been omitted. Had the original agreement, as contended for by the appellant, been carried out by the filing and granting of an application for permission to exchange stock for the assets turned into the corporation, each of the parties would have received less than 5,000 shares of stock since the value of the assets did not justify the issuance of the entire authorized stock. In that event, the directors could have sold the remaining stock if a permit for the same had been secured. The only difference would have been that the appellant would then have been a director and have had a voice in deciding upon whether or not the stock should be sold. The legal situation was the same after the trial of this action, although the appellant

had theretofore resigned as a director and thereby deprived himself of an opportunity to pass upon this question. The finding complained of is supported by the evidence, the court did not make a different contract for the parties, and the contract, as made, has been carried out.

[3] A further consideration is that the appellant approved the application for permission to issue stock in payment for the assets contributed to the corporation which was filed pursuant to the court's order, that he accepted the stock thus issued and that, after knowledge of the sale and issuance of the stock to King, he participated in the stockholders' meeting and voted his stock and thereafter acted as a director of the corporation, having been elected such through the use of the stock issued to him in conformance with the decree. Having thus accepted the benefits of the decree and having received all that the evidence shows he was entitled to receive, he is not in a position to appeal from the judgment. Estate of Shaver, 131 Cal. 219, 63 P. 340; Preluzsky v. Pacific Cooperative C. Co., 195 Cal. 290, 232 P. 970; County of San Bernardino v. County of Riverside, 135 Cal. 618, 67 P. 1047.

[4] It is further contended that the court erred in finding that title to the assets contributed by the parties passed to the corporation. It is argued that the Corporate Securities Act provides that no corporation shall issue or sell any of its stock until it shall have received a permit authorizing it to do so. It clearly appears that these assets were turned over to the corporation to be paid for by the issue of stock upon the approval thereof by the corporation commissioner. This was done and it is immaterial, as far as this appeal is concerned, that the approval of the corporation commissioner was not obtained until after the trial. That approval was obtained before final judgment and all that the appellant prayed for in this connection, was that the court determine the relative rights and interests of the parties in and to the assets in question, and "make an order of distribution in conjunction with the distribution of said assets in conformity with the interests found to be in said parties." This has been done and the appellant has accepted the court's award.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

37 Cal.App.2d 678

**GOULD & KANE, Inc., v. VALTERZA et al.**

**Civ. 11122.**

District Court of Appeal, First District, Division 2, California.

March 8, 1940.

**1. Nuisance ⇐32**

A landowner could sue to enjoin maintenance of poultry hatchery and market on ground of nuisance without making allegations showing special injury, in view of distinction between injury to property rights and injury to abstract rights.

**2. Nuisance ⇐32**

In suit by landowner to enjoin maintenance of poultry hatchery and market nearby on ground of nuisance, allegations of anticipated damages from insects and other pests, offensive smells, and dust, *held* sufficient in stating irreparable injury.

**3. Nuisance ⇐23(2)**

In suit to restrain commission of threatened continuing trespass on plaintiff's land, consisting in maintaining nuisance by operating poultry hatchery and market nearby, suit for damages was not a "plain, speedy, and adequate remedy" precluding injunction.

See Words and Phrases, Permanent Edition, for all other definitions of "Plain, Speedy, and Adequate Remedy."

**4. Nuisance ⇐36**

In suit to enjoin maintenance, as a nuisance, of poultry hatchery and market, wherein complaint was directed against some operations only of defendants and findings followed allegations of complaint, judgment was not erroneous as assuming that operation of the business must necessarily result in a nuisance.

**5. Nuisance ⇐36**

In suit to enjoin maintenance as a nuisance of poultry hatchery and market, judgment which did not enjoin the marketing of dressed meats was not too broad on theory that it did not permit conduct of the business even in a manner not injurious to plaintiff.

---

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Gould & Kane, Incorporated, against Charles Valterza and others, for

injunction against maintenance of nuisance. From a judgment for plaintiff, defendants appeal, bringing up the judgment roll.

Affirmed.

Carleton L. Rank, of Oakland, for appellants.

Cecil N. Lavers, of Albany, for respondent.

STURTEVANT, Justice.

In an action to obtain an injunction to prevent the defendants from maintaining a nuisance the trial court awarded the plaintiff a judgment. The defendants have appealed and have brought up the judgment roll. In effect the defendants contend that the plaintiff's complaint did not state a cause of action, that its allegations were not sustained by the proof, and that the judgment is not supported by the findings.

The plaintiff corporation owns adjoining lots located in a certain block facing Kains avenue. The defendants own lots in the same block facing San Pablo avenue. Said lots abut at the rear end thereof. The said block is located in the City of Albany, Alameda county. Heretofore ordinance 351 was enacted by the city council of Albany as a zoning ordinance. The classification as made by that ordinance places said block in a class called Six Story Commercial District. The ordinance by cross-references prohibits in the Six Story Commercial District "chicken or rabbit keeping or raising" and "stockyards or slaughtering of animals or fowls" and "in general those uses which may constitute a nuisance or which may be noxious or offensive by reason of emission of odor, dust, smoke, gas, or noise". Section 16 provides: "Any building or structure erected or maintained in violation of any provisions of this ordinance is hereby declared to be a public nuisance, and may be abated in the manner provided by law." Section 19 provides that a violation of the provisions of the ordinance is a misdemeanor. In paragraph III of its complaint the plaintiff alleged that on the lots owned by the plaintiff it has recently constructed three new dwelling houses. In paragraph IV it alleged that on the lots owned by the defendants they are proceeding to erect store and hatchery buildings for the purposes of "chicken or rabbit keeping or raising; operation of a hatchery incidental to chicken keeping or raising; operation of a hatchery as a wholesale business; stockyard or slaughtering of animals or fowl; and poultry market or store where live and or dead fowl is sold". In paragraph VII the plaintiff alleged: "That the defendants and each of them intend to place said lots 18 and 19, and the hatchery and store building being erected thereon to the uses enumerated in paragraph IV hereof; and that if said defendants or any of them are permitted to put said lots 18 and 19 to said uses the plaintiff will suffer great and irreparable damage and injury and will be affected adversely, and the free, peaceful and undisturbed use and enjoyment of its said lots and three dwelling houses thereon will be materially hampered, interfered with and taken away in this, that said uses will have a natural tendency to and will attract and bring into and keep on said lots 18 and 19 and in the vicinity and on said land of petitioner many flies, insects, rats, mice, and other rodents and pests, and will cause the emission of constant nerve racking noises of fowl, and will cause stenches and offensive smells to be carried onto the real estate of petitioner, and will cause dust, laden with offensive matter to be carried onto the lots, and upon and into the said dwelling houses of the petitioner to the extent that a person of ordinary sensibilities will find it intolerable to reside upon said premises of petitioner and in said dwelling houses; that this condition is aggravated by the existence of prevailing westerly winds, and the wetting and drying of the soil on said lots 18 and 19." The plaintiff also alleged, and the court found: "That by reason of the existence of said hatchery and store buildings partially completed as aforesaid on said lots 18 and 19, and the obvious, ominous and impending intended uses thereof the enjoyment of the real property and dwelling houses of petitioner is being materially, unlawfully and wrongfully interfered with to the extent that the sale and or rental values thereof have been greatly impaired; and that said interference is a continuous one on the part of defendants and each of them."

[1] The defendants complain because as they assert the plaintiff's allegations did not show that the acts of the defendants were "specially injurious to it". They rely on

City Store v. San Jose-Los Gatos, etc. Co., 150 Cal. 277, 88 P. 977. It will be noted at once that they fail to appreciate the distinction between injury to property right as distinguished from abstract rights. 20 Cal. Jur. 275 "Nuisances", sec. 12. The plaintiff cites and relies on Lind v. City of San Luis Obispo, 109 Cal. 340, 344, 42 P. 437. The rule stated in that case has not been departed from. Hassell v. San Francisco, 11 Cal.2d 168, 171, 78 P.2d 1021.

[2] The defendants' next point is that the plaintiff's allegations do not show its injury was irreparable. They cite and rely on Randall v. Freed, 154 Cal. 299, 97 P. 669. But in that case the counterclaim under attack did not allege the facts. It merely pleaded the conclusion that the plaintiff was committing "an injury which was irreparable". In the present case the facts are pleaded. They are sufficient. Schneider v. Brown, 85 Cal. 205, 207, 24 P. 715.

[3] They also claim that the plaintiff has a "plain, speedy, and adequate remedy" by a suit for damages. Bearing in mind that this is an action to restrain the defendants from committing a threatened continuing trespass on the real estate of the plaintiff, a suit for damages is not a plain, speedy, and adequate remedy. Daubenspeck v. Grear, 18 Cal. 443; Hulbert v. California etc. Cement Co., 161 Cal. 239, 245, 118 P. 928, 38 L.R.A.,N.S., 436.

[4] Again the defendants contend the operation of a poultry market is not a nuisance per se and therefore the action is premature and the judgment is erroneous in that it assumes the operation of the business must necessarily result in a nuisance. That contention is not supported by the record. The plaintiff's complaint was directed against certain operations of defendants but not against all of their operations. The findings of the trial court followed the allegations of the complaint.

[5] What we have just said leads us to the last point in which the defendants assert the judgment was too broad because it did not permit the conduct of the business even in a manner not to injure plaintiff. That contention, also, is not sustained by the record. The judgment in no manner enjoined the marketing of dressed meats.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



37 Cal.App.2d 682

**Ex parte VALTERZA.**

**Cr. 2120.**

District Court of Appeal, First District, Division 2, California.

March 8, 1940.

**1. Injunction ⇐219**

Where court had jurisdiction of the subject matter and of parties in injunction suit, alleged insufficiency of the complaint did not render injunction order void, so as to preclude punishment for contempt in violating such order.

**2. Nuisance ⇐36**

In suit to enjoin maintenance of poultry hatchery and market on ground of nuisance, injunction against operation of poultry house in violation of city ordinance was not void as an attempt to enforce penal provisions of the ordinance.

**3. Municipal corporations ⇐625**

An ordinance prohibiting the slaughter of chickens and rabbits was not unconstitutional as unreasonable because not prohibiting the slaughter of other fowl and animals, since all ordinances need not be embodied in one.

**4. Nuisance ⇐38**

Alleged invalidity of ordinance governing chicken or rabbit keeping or raising, caused by insufficient definition of the criminal offense of wrongful chicken or rabbit keeping or raising, did not affect validity of punishment for contempt in violating injunction against maintenance of poultry hatchery or market, since criminal offense was not involved.

**5. Municipal corporations ⇐604**

An ordinance prohibiting wrongful chicken or rabbit keeping or raising was not void for indefiniteness where courts had no trouble in ascertaining what the legislative department had in mind.

Proceeding in the matter of the application of Charles Valterza for writ of habeas corpus for relief from punishment for contempt.

Writ discharged, and petitioner remanded.

Carleton L. Rank and H. Gardner Putnam, both of Oakland, for petitioner.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst., R. Robert Hunter, Deputy, and Stanley C. Smallwood, Deputy, all of Oakland, for respondent Sheriff Driver.

J. Yovino-Young, City Atty., of Oakland, amicus curiæ for City of Albany.

Cecil N. Lavers, of Albany, amicus curiæ for Gould & Kane.

STURTEVANT, Justice.

[1] This is an application for a writ of habeas corpus. It rests on the following facts. After the judgment of the trial court was entered in Gould and Kane, Incorporated v. Valterza et al., Cal.App., 100 P.2d 335, the case this day filed, a showing was made to the trial court that the defendants had been guilty of contempt. A citation issued, a hearing was had, and Charles Valterza was found guilty. He applied to this court for a writ of habeas corpus. The writ issued, a return was made, and the application was submitted with the case above mentioned. The petitioner contends the complaint in Gould and Kane, Incorporated, v. Valterza et al., supra, was insufficient, that the trial court therefore had no jurisdiction, its judgment in favor of the plaintiff was void, and a violation of a void order is no contempt. But the vice in this contention is the assertion that the trial court's judgment was void. A similar assertion was addressed to the Supreme Court of Oregon in the case entitled Smith v. Schlink, 44 Colo. 200, 99 P. 566, at page 570, where the court said: "That the court had jurisdiction of the parties and the subject-matter cannot be questioned. This being true, and it not appearing that the judgment was not within the issues presented by the pleadings, however erroneous it may be, the judgment cannot be held to be void, so as to bring this case within the rule that disobedience of a void decree does not constitute contempt of court. Newman v. Bullock, 23 Colo. 217, 47 P. 379; Smith v. People, 2 Colo.App. 99, 29 P. 924; Rappalje on Contempts, § 33." In Clark v. Burke, 163 Ill. 334, 45 N.E. 235, at page 236, the Supreme Court of Illinois said: "It is contended, however, that the assignee was not bound to obey the order directing him to pay the claim in question, because that order was not authorized by the allegations in the petition, etc., and because the order went beyond the scope and prayer of the petition. It is well settled that, in a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrantly it may appear to be so. Leopold v. People, 140 Ill. 552, 30 N.E. 348, and cases there cited; People v. Weigley, 155 Ill. 491, 40 N.E. 300. This results from the well-settled rule that judgments of courts cannot be attacked collaterally for mere irregularities in the proceeding, however erroneous they may be. In this case, exemption from obedience to the order is not claimed because of inability to comply with it, arising from anything that has occurred since the order was made, but wholly upon the ground that the court erroneously entered that order. To sustain that defense would amount to no less than allowing the party to be the judge in his own case. In all such cases the remedy of the complaining party is by appeal or writ of error, and not by attempting to stand in defiance thereof." See, also, 13 C.J. 15.

[2] The next point made by the petitioner is that Gould and Kane, Incorporated, v. Valterza et al., supra, was, in effect, an attempt to enforce the penal provisions of the ordinance and therefore the judgment in that action was void. The courts have held otherwise on several occasions. 20 Cal.Jur. 309.

[3-5] The petitioner contends that Ordinance 351 is unconstitutional because its provisions are "arbitrary and unreasonable". He contends that because the ordinance prohibits the slaughter of chickens and rabbits and does not prohibit the slaughter of other fowl and animals it is unreasonable. That contention has been made on many occasions but the courts have uniformly answered that all ordinances need not be embodied in one. Again he asserts that the ordinance is void because it does not sufficiently define the criminal offense of wrongful "chicken or rabbit keeping or raising". Sec. 5, sub. (a), par. 6. The first answer is that the commission of a criminal offense is not involved in this proceeding. The second answer is that the trial court apparently had no trouble, and this court has no trouble, in ascertaining what the legislative department had in mind when it enacted said provision. In other

words, we are unable to say said provision is void because it is too indefinite.

The trial court did not act in excess of its jurisdiction. The writ is discharged and the prisoner is remanded.

We concur: NOURSE, P. J.; SPENCE, J.




37 Cal.App.2d 582

**Ex parte BELL et al.**

**Cr. 1719.**

District Court of Appeal, Third District, California.

March 1, 1940.

**1. Torts ⇐10**

Peaceable picketing is lawful under Fourteenth Amendment to Federal Constitution and California Constitution. Const. Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

**2. Torts ⇐10**

The right to picket by lawful means, is not confined to particular groups or unions, but extends to all individuals or classes desiring thereby to convey to public their opinions regarding labor controversies or promote their causes by presenting persuasive facts to other workmen in legitimate manner without force, violence, intimidation or threats. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

**3. Torts ⇐10**

"Peaceable picketing," recognized as lawful under state Constitution and Fourteenth Amendment, is picketing which does not interfere with another's person or property by unlawful use of force, violence, intimidation or threats. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Peaceable Picketing."

**4. Municipal corporations ⇐631(1)**

Whether acts and conduct of person accused of violating anti-picketing ordinance constitute compulsion, coercion, intimidation, force, violence, threats or putting in fear depends on varying circumstances of each particular case.

**5. Municipal corporations ⇐642(1)**

The sufficiency of evidence to show that acts or conduct of person accused of violating anti-picketing ordinance constituted compulsion, coercion, intimidation, force, violence or threats is primarily matter for determination by trial court or jury.

**6. Counties ⇐55**

A county ordinance, prohibiting picketing of employer's premises for purpose of inducing employee to quit employment by means of compulsion, coercion, intimidation, threats, acts of violence or fear, is not uncertain or ambiguous as to what acts and conduct are unlawful, but clear, valid and constitutional. Const.Cal. art. 1, §§ 9, 10; U.S.C.A.Const. Amend. 14.

**7. Counties ⇐55**

Acts with relation to picketing, accompanied by use of compulsion, coercion, intimidation, threats, violence or fear, prohibited by county anti-picketing ordinance, must be deemed unlawful, though ordinance does not define such terms, as their plain and common meaning is not doubtful.

**8. Counties ⇐55**

A county ordinance, prohibiting picketing of employer's premises for purpose of inducing person employed to quit employment by means of compulsion, coercion, intimidation, threats, acts of violence or fear, is not invalid as prohibiting acts declared criminal by state statute defining offense of assault and battery, as force or violence, constituting battery under such definition, must be used in course of picketing employer's premises to persuade or prevent workmen from continuing their employment to constitute "unlawful picketing" within such ordinance. Pen.Code § 242.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Picketing."

**9. Habeas corpus ⇐92(1)**

On petition for writ of habeas corpus by persons convicted of violating section of county ordinance prohibiting picketing of employer's premises for purpose of inducing employees to quit employment by compulsion, coercion, intimidation, etc., court need not determine constitutionality or validity of section of such ordinance prohibiting loitering on highway.

---

Petition by Rufus Bell and others for a writ of habeas corpus to review their con-

victions of violating an anti-picketing ordinance of Yuba county.

Petition denied.

Andersen & Resner, of San Francisco, for petitioners.

Joseph L. Heenan, Dist. Atty., of Marysville (Erling S. Norby, of Marysville, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This petition for a writ of habeas corpus presents the question of the constitutionality of a Yuba county anti-picketing ordinance.

The nine petitioners were tried and convicted in the justice's court of Marysville township of violating sections 2 and 3 of ordinance number 105 of that county. The complaint was couched in two counts. The first cause of action charged them with violating section 2 by wilfully and unlawfully loitering on a public highway. The second count charged them with unlawfully picketing the premises and the approach to the Earl Fruit Company near Marysville, where numerous workmen were employed for the purpose of inducing the employees by means of compulsion, coercion, intimidation, threats and acts of violence, to quit their employment and to prevent them from returning to their work. The jury found them guilty of both offenses. The court fined each defendant $500, and provided that in default of payment of the fine that each should be imprisoned in the county jail for six months. That was the maximum penalty prescribed for violating any one provision of the ordinance. On appeal, the superior court of Yuba county affirmed the judgment of conviction, but modified the sentence of imprisonment, reducing the same to three months. This petition for a writ of habeas corpus was then presented.

It is contended that both sections 2 and 3 of the ordinance are invalid for the reason that each of them deprives the petitioners of their constitutional rights to freedom of speech and assemblage in violation of the Fourteenth Amendment to the Federal Constitution, and of article I, sections 9 and 10 of the Constitution of California. The evidence upon which the petitioners were convicted is not before this court.

Section 2 of the ordinance provides that: "It is unlawful for any person to loiter, stand, or sit in or upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage therein or thereon of persons or vehicles passing or attempting to pass along the same, or so as to in any manner annoy or molest persons passing along the same."

Section 3 provides: "It is unlawful for any person to beset or picket the premises of another, or any approach thereto, where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or resides, *for the purpose of inducing such employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear, to quit his or her employment or to refrain from seeking or freely entering into employment.*" (Emphasis added.)

[1, 2] There is no doubt that peaceable picketing is recognized as lawful under the Fourteenth Amendment to the Federal Constitution, and article I, sections 9 and 10 of the California Constitution. Senn v. Tile Layers' Pro. Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; In re Lyons, 27 Cal. App.2d 293, 81 P.2d 190; Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314, 317. The right to picket by lawful means is not confined to particular groups or unions, but may be enjoyed by all individuals or classes who desire to thereby convey to the public their opinions regarding labor controversies or to promote their causes by presenting persuasive facts to other workmen, in a legitimate manner, free from force, violence, intimidation or threats. That constitutional privilege may not be conferred upon one class and denied to others. It is guaranteed to all on the same basis, upon the theory that it is a lawful exercise of the constitutional guaranty of freedom of speech, press and assemblage.

[3] The term "peaceable picketing" requires no definition. Obviously it authorizes picketing which does not interfere with the person or property of another by the unlawful use of force, violence, intimidation or threats. The meaning of that term is so clear that all persons of common understanding must be deemed to know what it denotes.

[4-6] The question as to whether the acts and conduct of a person accused of

violating an anti-picketing ordinance constitute compulsion, coercion, intimidation, force, violence, threats or fear, depends upon the varying circumstances of each particular case. Apparently it is impossible to specify just what acts or conduct will amount to such prohibited means of picketing. The sufficiency of the evidence in that regard is primarily a matter for the determination of the trial court or jury. The ordinance in this case has prescribed the general standard by means of which the acts and conduct of the accused may be judged to be either lawful or unlawful. That is a sufficient designation to fulfil the requirements of the law. The ordinance is not uncertain or ambiguous in that regard.

It is the opinion of this court that section 3 of Yuba county ordinance number 105 is neither uncertain nor ambiguous. It is clear, valid and constitutional.

[7] The meaning of such terms as compulsion, coercion, intimidation, etc., are well established. They require no definition by the legislative body to render their meaning certain. When such terms are found in an ordinance like the one in question, their plain and common meaning is not open to doubt. Acts with relation to picketing, accompanied by the use of any one of those elements, must be deemed to be unlawful.

Petitioners cite the case of Lisse v. Local Union No. 31, supra, in support of the proposition that a person may employ lawful and peaceful acts to procure a result amounting to moral intimidation or coercion.

It is true the court there said that employees, after striking, might use "moral intimidation and coercion," to threaten a like boycott against another. However, the court said in that same case, regarding the circumstances which may be deemed to constitute unlawful acts: "In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault." (Citing authorities.)

The court then quoted with approval a rule from Martin on Labor Unions, page 229, as follows: "Even a simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose."

In support of the proposition that such action is unlawful the court cites Southern California Co. v. Amalgamated Association, 186 Cal. 604, at page 612, 200 P. 1, 4. In that case the Supreme Court says: "Moreover, if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal."

In the Matter of Williams, 158 Cal. 550, 111 P. 1035 a section of a Los Angeles ordinance worded precisely the same as the one now in question was upheld as a valid exercise of the powers of a municipal corporation. Mr. Chief Justice Beatty wrote the opinion. The syllabus correctly states the law of that case as follows: "An ordinance declaring it to be a misdemeanor to engage in 'picketing,' for the purpose of intimidating, threatening, and coercing persons in order to induce them to refrain from engaging in a particular employment, is a valid exercise of the powers of a municipal corporation."

The meaning of the terms "intimidation", "threaten", and "coercion", as they were used in that Los Angeles ordinance thirty years age were not questioned. Their meaning is commonly known to all persons of ordinary understanding. There is no reason why such terms should convey a different meaning today.

In the case of Jordahl v. Hayda, 1 Cal. App. 696, 82 P. 1079, 1080, the judgment of the superior court of Humboldt county, granting an injunction against further acts of picketing, was affirmed upon appeal. The court in an opinion by the late Mr. Presiding Justice Chipman, said: "Appellants contend that the words used in the findings, such as 'threats,' 'acts of intimidation,' 'interfered with,' 'driven away' or 'prevented,' as applied to the conduct of defendants toward the patrons of plaintiff, imply force * * *. We do not think

these words as used in the findings and judgment imply that it was necessary to show physical force on the part of defendants towards anyone. Persons might have been 'prevented' from patronizing plaintiff, or 'driven away' from his place of business, or 'interfered with' in an attempt to go into or out of his restaurant, by conduct falling short of actual violence, and yet the conduct might be of such character as to effect the object of defendants to the injury of plaintiff."

Petitioners cite the case of Senn v. Tile Layers Protective Union, supra, in support of their contention that the Yuba county ordinance is invalid. Mr. Justice Brandeis delivered the opinion of the court in that case. His language used in upholding the Wisconsin Labor Code, the constitutionality of which was involved in that case, is most persuasive in support of the validity of section 3 of the Yuba county ordinance. The Wisconsin Labor Code authorized publicity of labor disputes; declared peaceable picketing and patrolling lawful, and prohibited the granting of an injunction against such conduct.

The following provisions of section 103.53 of the Wisconsin Labor Code were directly involved in that appeal:

"(1) The following acts, whether performed singly or in concert, shall be legal:

* * * * * *

"(e) Giving publicity to * * * facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without *intimidation* or *coercion,* or *by any other method not involving fraud,* violence, breach of the peace, or *threat* thereof."

The Wisconsin supreme court found that the union observed the limitations prescribed by the statute. Mr. Justice Brandeis in supporting the contention that the statute did not violate appellant's constitutional rights in that case said, 301 U.S. at page 478, 57 S.Ct. at page 862, 81 L.Ed. 1229: "The Legislature of Wisconsin has declared that 'peaceful picketing and patrolling' on the public streets and places shall be permissible 'whether engaged in singly or in numbers' provided this is done 'without intimidation or coercion' and free from 'fraud, violence, breach of the peace, or threat thereof.' The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. It precludes the *intimidation* of customers. It precludes any form of physical obstruction or interference with the plaintiff's business."

The provisions of the Wisconsin Labor Code, which were upheld as valid by the United States Supreme Court, authorized picketing and patrolling under specified circumstances only. That act set up a standard of peaceable picketing very similar to that which is authorized by the Yuba county ordinance. It provided that picketing shall be conducted without *intimidation or coercion.* Those terms were not defined by the Wisconsin Labor Code. Those identical words are contained in section 3 of the Yuba county ordinance. The United States Supreme Court did not assume that it was necessary for the words to be defined in the Wisconsin Labor Code. There is no reason why they should be specifically defined in the ordinance which is here involved.

The case of Local Union No. 26 etc. v. City of Kokomo, 211 Ind. 72, 5 N.E.2d 624, 628, 108 A.L.R. 1111, upon which the petitioners rely, is not in conflict with what we have previously said regarding the validity of the Yuba county ordinance. The Indiana case merely holds that an anti-picketing ordinance is void which conflicts with a general statute prohibiting the issuing of an injunction against picketing unless it is conducted by means of "fraud or violence". The appellants in that case, who belonged to a local cooperative Potters Union, declared a strike and picketing the premises of their employer in Kokomo. The employer procured an injunction to prohibit them from maintaining the picket line in violation of a city ordinance against picketing with the use of "compulsion, threats, coercion, intimidation, force, fraud or violence". The members of the Potters Union brought suit to declare the ordinance void for the reason that it conflicted with the general act of the legislature of 1933 which declared that it was the policy of the state of Indiana to authorize as legal all picketing by any means except with the use of "fraud or violence". The complaint of the Potters Union affirmatively alleged that they used only peaceable methods of picketing their employer's premises, and that they urged and advised others to refrain from working, without the use of "coercion, in-

timidation, fraud or violence". A demurrer to that complaint was sustained. On appeal, the court reversed the judgment, saying: "The city ordinance now before the court makes all picketing of the employer's premises, or the approach thereto, unlawful. No force or violence is necessary to make the act of picketing unlawful and punishable. Peaceable acts upon the part of the employees are authorized expressly by chapter 12 of the Acts of 1933. The allegations of the complaint show no acts involving fraud or violence. The 1933 act authorizes the doing of all acts alleged in the complaint, which alleges that such acts were performed by lawful means and without fraud or violence, or any intention or purpose to injure the employer. The act of striking or picketing necessarily involves compulsion and coercion, and *unless the same is performed by acts of fraud or violence, is lawful and permissible under the statute.*"

All that may be said of the Indiana case is that it holds the Kokomo city ordinance to be void because it violates the general statute of that state which legalizes picketing by all means except with the use of "fraud or violence". The complaint declared that the picketing was not carried on by means of "compulsion, threats, coercion, intimidation, force, fraud or violence", but on the contrary that it was conducted only in a lawful and peaceable manner. For the purpose of the demurrer the allegations of the complaint were accepted as true.

That case does not hold that picketing by means of compulsion, coercion, intimidation or threats of bodily harm, is lawful, regardless of the provisions of an ordinance to that effect, when there is no general statute to the contrary. If the opinion in that case is so construed, then we are not in accord with it. But clearly it merely holds that the Kokomo city ordinance is void because it violates the provisions of the general law of that state which confines unlawful picketing to that which is performed by means of *fraud or violence.*

In the present case the anti-picketing ordinance of Yuba county does not violate the provisions of a statute of this state. California has no statutory provision limiting the police powers of a county to enact any reasonable anti-picketing ordinance. The Indiana case is therefore valueless in determining the constitutionality of the Yuba county ordinance. It is not in point.

[8] The petitioners contend that the ordinance in question is invalid because it purports to prohibit acts which are declared by other statutes of California to be unlawful and criminal. In support of that assertion it is suggested that the anti-picketing ordinance involves the same elements which render an assault and battery unlawful. There is no merit in that contention. The essential elements of unlawful picketing are quite different from those which constitute the offense of assault and battery. A battery is any wilful and unlawful use of force or violence upon the person of another. Sec. 242, Pen. Code. That definition does not cover the offense of unlawful picketing as it is defined in the ordinance. To constitute unlawful picketing it requires more than the mere use of force and violence upon the person of another. That force or violence, intimidation or threat must have been used in the course of picketing the premises of an employer to persuade or prevent workmen from continuing their employment. One may be guilty of battery without violating the anti-picketing ordinance. It is immaterial that one who is guilty of violating the picketing ordinance may also subject himself to prosecution for battery or some other offense. Since the essential elements of the first offense are different from those of the latter, the acts are not conflicting. Both are valid criminal enactments.

[9] The judgment of commitment shows that petitioners were tried and convicted for violations of both sections 2 and 3 of Yuba county ordinance number 105. Section 2 contains an inhibition against unlawful "loitering" on the highway. Section 3 creates a separate and distinct offense pertaining to picketing.

Petitioners having been found guilty under both sections 2 and 3, as charged, it is not necessary for this court to determine the constitutionality or validity of section 2 of this ordinance. The validity of section 2 has no effect upon section 3, the constitutionality of which has been determined.

The petition for a writ of habeas corpus is hereby denied.

We concur: PULLEN, P. J.; TUTTLE, J.

37 Cal.App.2d 637

## FAY SECURITIES CO. v. MORTGAGE GUARANTEE CO. et al.

Civ. 2507.

District Court of Appeal, Fourth District, California.

March 6, 1940.

**1. Appeal and error ⇐949**

Trial court's refusal to grant declaratory relief was required to be upheld on appeal unless abuse of discretion appeared. Code Civ.Proc. § 1061.

**2. Action ⇐6**

In action for declaratory relief determining boundary lines of plaintiff's lot and for an order compelling removal of any portion of a building encroaching on plaintiff's lot, failure of trial court to grant relief was not abuse of discretion, where the evidence would require any finding concerning boundary lines to be against plaintiff, and evidence indicated that in view of plaintiff's long delay in asserting its rights the order sought would not be justified even if alleged encroachment existed. Code Civ.Proc. § 1061.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by the Fay Securities Company against the Mortgage Guarantee Company and others for declaratory relief determining boundary lines of plaintiff's lot and for an order compelling removal of alleged encroachment on plaintiff's lot. The action was dismissed as to defendants Arthur Skinner and wife. From an adverse judgment, the plaintiff appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This action involves the boundary lines of certain lots lying between Workman street and Pasadena avenue in Los Angeles. Pasadena avenue comes into Workman street at a rather sharp angle. A triangular tract between these two streets was subdivided into lots, the map being recorded in 1878. The lots in question face easterly upon Workman street and westerly upon Pasadena avenue. Because of the angles at which the streets run, the southerly line of each lot is longer than its northerly line. The recorded map shows each lot in question with a frontage of fifty feet on Workman street and a frontage of fifty-two feet on Pasadena avenue. The length of the southerly line of each lot is shown in feet but the degrees of the angles are not shown.

The plaintiff owns lot 26 in this tract. The defendant Mortgage Guarantee Company owns the adjoining lot on the south, which is lot 25. The defendants Skinner own lot 27, which is to the north of lot 26. All of these parties hold under deeds which describe the respective lots by reference to the above-mentioned map. The plaintiff acquired lot 26 in 1930. At that time, and for some years prior thereto, all three of the lots in question were improved with brick buildings.

In 1935 the plaintiff brought this action. The complaint alleged, among other things, that the distance between the northerly and southerly boundary lines of lot 26 was fifty feet, but that the distance between the Skinner building, to the north of lot 26, and the Mortgage Guarantee Company building to the south of that lot, was only 49.4 feet at the westerly end of the Skinner building and 49.54 feet at the easterly end of that building. In other words, it was alleged that there was an encroachment of nearly a foot at one end of the building and about six inches at the other. It was then alleged that the plaintiff was unable to determine the location of the north and south boundaries of its lot or to tell which of the adjoining buildings encroached thereon, and that an actual controversy existed between the parties relating to the location of the northerly and southerly boundary lines of lot 26. It was alleged that the owner of each lot and their predecessors had paid taxes on each lot, respectively, for more than fifty-seven years. The prayer was for declaratory relief; that the court determine the true boundary lines of lot 26 and whether or not either of the adjoining buildings encroached upon that lot; that in the event the court found that either of the adjoining buildings thus encroached it order the encroaching defendant to remove any such portion of his building; and that the plaintiff be given proper writs to compel the removal of any encroaching portions of the adjoining buildings.

The plaintiff introduced evidence which it relies upon as showing that the building owned by the defendant Mortgage Guarantee Company extended over the southerly line of plaintiff's lot a distance of about a foot at its westerly end and about six inches at its easterly end. The defendant Mortgage Guarantee Company introduced evidence which, if accepted, shows that its building rested entirely upon its own lot. The action was dismissed as to the defendants Skinner.

The court found and decreed that a determination at this time of the boundary lines between these properties is not now necessary or proper under all of the circumstances, that no damage or inconvenience has been caused the plaintiff or is being caused the plaintiff at this time by reason of the location of the improvements upon the respective properties, and that the plaintiff's cause of action to enforce removal of any buildings or improvements or for a mandatory injunction, even though an encroachment existed, is barred by reason of the long delay of plaintiff in asserting its claimed rights. Judgment was entered that the plaintiff take nothing and awarding defendants their costs of suit. From this judgment the plaintiff has appealed.

Appellant's main contention is that the court failed to find on a material issue and erred in failing to give declaratory relief to the appellant by determining the boundary lines of its lot. It is argued that an actual controversy existed in this regard, that the evidence showed that the appellant owned a lot fifty feet in width but had actual occupation of only about forty-nine feet thereof, and that it was the duty of the court not only to determine the true boundary lines but to order the removal of encroaching portions of the respondent's building. It is further argued that under these circumstances section 1061 of the Code of Civil Procedure, which authorizes a court to refuse to exercise its power of declaratory relief in any case where its declaration or determination is not necessary or proper at the time and under all of the circumstances, has no application.

[1] The refusal of the court to grant declaratory relief must, in view of the Code section referred to, be upheld on appeal unless an abuse of discretion appears. Cutting v. Bryan, 206 Cal. 254, 274 P. 326. It should also be remembered that the declaratory relief sought by the appellant, namely, the fixing of the boundaries, was united with an attempt to enforce the removal of portions of the respondent's building. To have given declaratory relief by fixing the boundaries alone would have given no immediate benefit to the appellant. While the action was brought in the form of one for declaratory relief because of the appellant's uncertainty as to which of the defendants was encroaching upon its land, after the action was dismissed as against the Skinners it was, in practical effect, one to compel the respondent to remove a part of its building from the appellant's land.

Nor does the evidence indicate that the appellant has been aggrieved by the judgment. The entire controversy rests upon a difference in the methods used by the respective parties in measuring the lots, that is, in following the lines and distances as set forth in the map recorded in 1878. Under the method contended for by the appellant the evidence indicates that most of the buildings on lots in this tract would be encroaching upon the adjoining lots.

Surveyors called as witnesses for the respondent testified that they located the original southwest corner of the tract covered by the map of 1878, that from that point they traced the lines and distances given on the recorded map, and that following the distances thus given the various lots worked out correctly as they were occupied, and the respondent's building was entirely upon its lot and did not encroach upon the appellant's land. They testified that since the map shows only the distances and not the angles, they followed these distances under which method the various lots, as built upon, correspond to the recorded map. They further testified that as the tract lay upon the ground, if a lot measured fifty feet on Workman street and fifty-two feet on Pasadena avenue the lot's northerly and southerly lines could not be exactly parallel.

The only evidence pointed out by the appellant which could show that the respondent's building encroached upon its lot is based and rests entirely upon the testimony of one surveyor. He testified that the recorded map was in error; that he could not give each lot fifty-two feet frontage on Pasadena avenue as called for by the map; that he had not measured it because he was unable to locate the original corner but that mathematically it would not work

out; that he had taken an old fence which he considered an old monument and had then drawn parallel lines at right angles to Workman street and running through to Pasadena avenue, which he had taken as the true lines intended by the map and which would give each lot a uniform width of fifty feet. It thus appears that this surveyor worked without an established original starting point and that he assumed that all lot lines were at right angles to the line of Workman street when the recorded map shows no such angles. It does not appear that Workman street runs exactly north and south, in fact the copy of the recorded map in the record indicates the contrary. If, in fact, that street runs in a northwesterly direction, as indicated by the map, the method adopted by this surveyor might well result in its being found that the appellant's building encroached upon the land of the respondent. If, instead of assuming lot lines at right angles to Workman street, this surveyor had assumed that these lines were at right angles to Pasadena avenue it would certainly result that appellant's building encroached upon respondent's land. The unreliability of this testimony and the impropriety of any such assumptions as to the angles is not only apparent but destroys the value of the evidence upon which the appellant relies.

[2] There is no evidence in the record which would have supported a judgment in favor of the appellant establishing boundary lines of its lot as contended for by it, or in such a manner as would show any encroachment thereon by any portion of the respondent's building. If the court had found the location of these boundary lines upon the evidence called to our attention, the finding would necessarily have been in favor of the respondent and against the appellant. It follows that the appellant has not been aggrieved by the judgment and, in so far as the appellant is concerned, no abuse of the discretion vested in the trial court here appears.

A further consideration is that, in so far as it is brought to our attention, the evidence indicates that in view of the appellant's long delay in asserting its rights the case is not one justifying a mandatory order compelling the respondent to remove a portion of its building from the plaintiff's land. Rankin v. DeBare, 205 Cal. 639, 271 P. 1050; Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833.

The only other point raised is that the occupation by respondent of a portion of appellant's land without the payment of taxes thereon would not sustain a decree awarding title because of adverse possession. The judgment is not based upon any such consideration and the question suggested is not here involved.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.




37 Cal.App.2d 642

**PALM SPRINGS–LA QUINTA DEVELOPMENT CO. v. KIEBERK CORPORATION et al.**

**Civ. 11329.**

District Court of Appeal, First District, Division 2, California.

March 7, 1940.

**1. Appeal and error ⇐954(1)**
**Injunction ⇐135**

The granting or denial of a temporary restraining order is left to the discretion of the trial court, and the order should not be reversed except upon clear showing of abuse of discretion.

**2. Injunction ⇐174**

There can be no abuse of judicial discretion in dissolving temporary restraining order after determination of disputed fact questions, where evidence of facts upon which discretion is exercised, if true, supports the conclusion reached, and lack of diligence by plaintiff is shown.

**3. Injunction ⇐174**

Dissolution of temporary restraining order *held* not an abuse of discretion, in view of conflicting evidence on whether plaintiff or defendants were violating the sales contract, and whether plaintiff would suffer damage from the acts complained of.

**4. Injunction ⇐175**

Plaintiff's failure to prosecute his motion for an injunction is an important factor

In affecting trial court's decision on motion to dissolve restraining order. Code Civ. Proc. §§ 527, 963.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Palm Springs-La Quinta Development Company against Kieberk Corporation and another for declaratory relief and for injunction. From part of an order of the trial court resolving a temporary restraining order, plaintiff appeals.

Motion to dismiss appeal dismissed, and the portion of the order appealed from affirmed.

S. W. Newman, of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black, Isaac Pacht, and Alfred P. Chamie, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

The plaintiff sued for declaratory relief and for an injunction. A demurrer to the complaint was sustained with leave to amend, and at the same time the trial court dissolved the temporary restraining order. The appeal is taken from the portion of the order reading "Restraining order is dissolved."

One Kiener had an exclusive sales contract to sell land owned by the Big Bear Land and Water Company. Later he obtained an exclusive sales contract to sell land owned by the Palm Springs Land and Irrigation Company. In these activities he had developed a card index system amounting to about 54,000 cards, referred to as "lead cards", each card representing a "prospect" because of sales of memberships in the Peter Pan Woodland Club or interests in lands owned by the Big Bear or Palm Springs companies. These cards were used by salesmen in the sale of cabin sites on the Big Bear property and later in the sale of lots of the Palm Springs Company. In 1936 Kiener withdrew from business and transferred his interest in the foregoing rights and properties to the plaintiff under a written contract. The appellant claims the right of exclusive possession and use of the "lead cards" under the contract. The respondents rely upon the express terms of the written contract providing that the "Kieberk Corporation is not contracting to sell or convey to you, your Company, or anyone else, the cabinets or the lead cards in question, but is merely permitting you and the Palm Springs La Quinta Development Company the use of the cabinets and cards under the following conditions:"

[1] The appeal presents a single "fact" case. No question of law is involved except this plain, elementary principle, which requires no citation of authority: The granting or denial of a temporary restraining order is left to the discretion of the trial court, and the order should not be reversed except upon a clear showing of an abuse of that discretion.

[2, 3] When the motion to dissolve the temporary restraining order was presented it was heard upon affidavits which appellant concedes embodied "many controverted questions of fact". All the essential allegations of the complaint were denied, and facts were alleged in respondents' affidavits to show that appellant was violating the contract, that respondents were not, and that appellant would suffer no damage from any of the acts complained of. Upon this showing the order appealed from was reached after a determination of disputed questions of fact and a showing of lack of diligence by plaintiff. There can be no abuse of judicial discretion under such circumstances when the evidence of the facts upon which it is exercised, if true, support the conclusion reached. Appellant's appeal rests upon the untenable ground that we should believe its witnesses and then substitute our opinion and judgment on the facts for that of the trial court.

[4] The restraining order was made on September 10, 1936. It was dissolved on October 1, 1936. Under section 527 of the Code of Civil Procedure the life of such an order is ten days unless good cause for continuing it is shown. If, under any interpretation of section 963 of the same code, an order of dissolution of a temporary restraining order is appealable, the failure of the plaintiff to prosecute his motion for an injunction is an important factor in affecting the decision of the trial court on the motion to dissolve the restraining order.

The motion to dismiss the appeal is dismissed. The portion of the order appealed from is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

37 Cal.App.2d 615

**PEOPLE v. ANDERSON et al.**

Cr. 2115.

District Court of Appeal, First District, Division 1, California.

March 5, 1940.

**1. Larceny ⇐55**
**Robbery ⇐24(1)**

Evidence sustained conviction of robbery and theft of automobile.

**2. Criminal law ⇐552(1), 1159(6)**

A guilty participation may be shown by circumstantial evidence as well as by direct evidence, and, if circumstances proved reasonably justify conclusion of jury, reviewing court cannot interfere therewith.

**3. Robbery ⇐26**

In robbery prosecution, whether accused was driver of automobile which person committing robbery used as a "getaway" car was for jury.

**4. Robbery ⇐26**

In robbery prosecution, whether accused, who drove automobile which person committing robbery used as a "getaway" car, had knowledge that person had committed a robbery, was for jury.

**5. Larceny ⇐68(1)**

Whether accused participated in theft of automobile was for jury.

---

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Raymond Anderson and another were convicted of robbery and theft of an automobile, and Raymond Anderson appeals.

Affirmed.

Willard W. Shea, Public Defender and Joseph R. Deasy, Asst. Public Defender, both of Oakland, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Anderson and his codefendant Malone, by information, were jointly charged with having committed three separate robberies, and with the theft of an automobile. In addition, Anderson was charged with a prior conviction of forgery (which he admitted), for which he was on probation at the time the offenses charged in the information were committed. Malone was found guilty on all three robbery counts, and of the theft of the automobile. He has not appealed. Appellant was convicted on one robbery count and of the theft of the automobile.

On this appeal the sole contention of appellant is that, as a matter of law, the evidence is insufficient to sustain his conviction.

The theory of the prosecution was that Malone and Anderson engaged in the robbery of various grocery stores in Oakland; that Malone robbed the stores and that Anderson drove the car used by the parties for their "getaway"; that for such purposes the parties used an automobile recently stolen by them. To support this theory the prosecution produced the following evidence:

George McClain and his partner, Fitzpatrick, operated a used car lot in Oakland. On July 5, 1939, they owned and had for sale at their place of business, an Auburn convertible sedan, painted light tan, with red wheels and a canvas top. It bore 1939 California license plates 2 E 723. The car was on the lot at, or about 1 p. m. on July 5th when McClain left his place of business unattended for about twenty minutes. When he returned at about 1:20 p. m. the car was gone. He testified that neither he nor his partner gave any person permission to take the car. At about 3 o'clock of that day McClain received a telephone call from a person unknown telling him the car would be left on a street near the used car lot. Sometime after 4:30 p. m. of that day the car was found abandoned on a street nearby.

When McClain returned to his place of business at 1:20 p. m. and discovered that the Auburn was missing, he was accompanied by a business acquaintance by the name of Virgil Martin. Martin was engaged in the tire business and had sold McClain tires for the Auburn. He was familiar with the car. Later that afternoon Martin and his wife were driving out East Twelfth street in the city of Oakland, when, between Fourth and Fifth avenues, they saw the missing Auburn cruising slowly along. Mrs. Martin fixed the time as between 2 and 3 o'clock, while Mr. Martin fixed the time as between 2:30 and 3 o'clock. The auburn slowly proceeded to completely encircle the block, followed by the Martins. After the Auburn had encircled the block Martin drove alongside. Both the Martins testified there were two men in

the car. Mrs. Martin positively identified appellant Anderson as the driver but could not identify Malone as the passenger. Mr. Martin positively identified Malone as the passenger, but could not positively identify Anderson as the driver, although he testified that Anderson "looked like" the driver of the car.

Martin told the occupants of the Auburn that the owner of the car was looking for it and that the owner believed it was stolen. Mrs. Martin testified that Anderson replied: "Yes, we are going to use it about 15 more minutes and then we are going to return it". This statement, according to Mrs. Martin, was corroborated by the passenger in the Auburn. Mr. Martin testified his conversation was with the passenger Malone and not with the driver. Otherwise, in substance, his testimony corroborated that of his wife.

The robbery forming the basis of the charge upon which Anderson was convicted took place between Fourth and Fifth avenues on East Twelfth street, Oakland, at about 3 o'clock that same day. Located in this block was a Safeway store in charge of John Tuite. This witness testified that at about 3 o'clock he was held up by Malone who covered him with a gun and took about $38.00 from him. As Malone left the store Tuite followed him. He saw Malone "jump into the *rear* seat of a convertible sedan", whereupon the car drove off. (Italics ours). Tuite testified that he noted the license number, which was California 1939 license 2 E 723. He further testified that, as the car "pulled off", Malone "was looking out the back window". He identified the Auburn car from photographs. He further testified: "I saw Malone in the back seat after I got the number". He did not observe any other person in the car.

On July 10, 1939, appellant and Malone were arrested while entering a cafe in Oakland. Both denied any participation in any of the offenses charged. From statements made to the police, and from appellant's testimony on the trial, it appears that Malone and appellant are related, and that on July 5, 1939, both lived at the same rooming house, although they occupied different rooms. In Malone's room an unloaded gun was found. Anderson took the stand in his own defense. He testified that on July 5th he had gone to San Francisco and returned early in the afternoon and then went to a cafe where he spent the balance of the afternoon and early evening drinking. He named at least one person whom he stated saw him there, but this person was not produced as a witness. Malone did not take the stand.

This constitutes a fair summary of the pertinent evidence on the two counts upon which Anderson was convicted. He contends that, while this testimony may raise a suspicion as to his guilt, as a matter of law, it is insufficient to sustain the conviction on either count.

[1] While it must be conceded that the testimony is not as strong as might be desired, it is our opinion that it is legally sufficient.

[2] First as to the robbery. Appellant contends that the only evidence to connect him with the robbery was the testimony of the Martins that he was seen in the company of Malone shortly before the robbery. The Martins' testimony, and the testimony of the other witnesses, proved more than that. It tended to show, and in view of the verdict we must assume the jury found, that at about 3 o'clock Anderson was observed in the company of Malone driving slowly along East Twelfth street between Fourth and Fifth avenues, Oakland, in a recently stolen automobile; that the Safeway store that was robbed was in that block; that he cruised slowly around the block; that at about that time Malone robbed the Safeway store; that in leaving the scene Malone was driven away in the stolen car by an accomplice. From these facts the jury was reasonably entitled to conclude that Malone left the scene of the robbery in a car driven by Anderson; that this had been prearranged between Malone and Anderson; that appellant was a joint participant in the crime. Guilty participation may be shown by circumstantial evidence as well as by direct evidence. If the circumstances proved reasonably justify the conclusion of the jury, the reviewing court has no authority to interfere therewith. The principles applicable in such a case were recently stated by this court as follows in People v. Schneider, Cal.App., 98 P.2d 215, 216: "* * * appellant's main attack upon the sufficiency of the evidence is based upon the fact that there is an absence of direct evidence as to the actual delivery of the check to Weyel. It is well settled, however, that a fact relating to the guilt of an accused may be established by circumstantial as well as by direct evidence; that the right to draw proper inferences from the evidence is a function of the jury,

and that as long as its conclusions do not do violence to reason, a reviewing court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Martinez, 20 Cal.App. 343, 128 P. 952. In other words, as frequently said by the courts, circumstantial evidence may be as conclusive in its convincing force as the testimony of witnesses to the overt act (People v. Nagy, 199 Cal. 235, 248 P. 906; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631), and consequently where the circumstances proved reasonably justify the conclusion of the jury expressed in its verdict, it is beyond the authority of the reviewing court to interfere therewith. People v. Latona, supra. Furthermore, in considering the question of the sufficiency of the evidence, the reviewing court must assume in favor of the verdict the existence of every fact which the jury could have reasonably drawn therefrom. People v. Perkins, supra."

[3] Appellant relies on the case of People v. Seawright, 72 Cal.App. 414, 237 P. 796. In that case two men committed a robbery at 11:30 a. m. Approximately an hour later the two men who committed the robbery were picked up in an automobile. Seawright was in their company. In the car several guns were found, as well as some of the stolen property. Seawright's conviction for robbery was reversed on the ground of the insufficiency of the evidence. The vital distinction between that case and the present one is that in the Seawright case no one identified Seawright as being in the car at or shortly prior to the time of the robbery. In the instant case appellant was identified as the driver of a stolen car that was cruising about the scene of the robbery shortly prior to its occurrence. Within a very few minutes that car was used as a "getaway" car by Malone under circumstances from which the jury could infer that an accomplice was driving. The evidence amply supports the implied finding of the jury that Anderson was that driver.

[4] Appellant contends that, even if it was proved that he was the driver of the "getaway" car, there is no evidence that he had any knowledge that Malone had committed a robbery. Obviously, in the absence of a confession, such knowledge could only be proved by circumstantial evidence. Whether such knowledge existed is a question of fact for the jury. People v. Martin, 12 Cal.2d 466, 85 P.2d 880.

[5] In connection with theft charge, appellant argues that the most that was proved against him was that he was in possession of the stolen car about an hour after it was stolen. He relies on the rule that mere possession of stolen property, unexplained, will not justify a conviction for the theft of the property. That rule is clearly stated in People v. King, 8 Cal.App. 329, 96 P. 916, relied on by appellant. The rule is a sound and salutary one, but it has no application to the facts of this case. Here the evidence showed far more than unexplained possession of the stolen car. When the Martins stopped the Auburn and told appellant and Malone that the owner was looking for that car which he believed to be stolen, neither Anderson nor Malone denied that the car was stolen but simply stated that they were going to use the car for fifteen minutes more and then "return" it. Appellant did not deny the car was stolen, but in effect admitted it, and stated he would "return" it—i. e., bring it back to the place from which it was taken. When this evidence is coupled with the testimony of McClain that neither he nor his partner had given Anderson, Malone, or any other person permission to take the car, and with the evidence that the car was used in a robbery and shortly thereafter abandoned, it is evident that the jury could reasonably have inferred that appellant participated in the theft of the car. See People v. Griffin, 9 Cal.App.2d 246, 49 P.2d 321; People v. Russell, Cal.App., 94 P.2d 400.

The judgments of conviction and the orders denying new trials appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.




37 Cal.App.2d 591

**MANNING v. GAVIN et al.**

**Civ. 10847.**

District Court of Appeal, First District, Division 1, California.

March 4, 1940.

Hearing Denied May 2, 1940.

**1. Trial ⇐295(10)**

In order to determine whether instructions were erroneous as directing verdict, instructions must be read in connection with the others given and interpreted in the light

of the issues raised by the pleadings and the evidence.

**2. Trial ⇐241**

In action for attorney's fees, defended on ground that attorney's services were rendered under contract with third person to whom attorney was to look for payment, where attorney did not file affidavit denying genuineness and due execution of such contract, nor claim that contract was spurious, instruction in statutory language that attorney had admitted "the genuineness and due execution" of such contract was not erroneous. Code Civ.Proc. § 448.

**3. Appeal and error ⇐1064(1)**

In action for attorney's fees, wherein the main issue was whether attorney was working for third person who was an independent contractor, or under express agreement by defendant to pay for services, instruction that relationship of attorney and client would not exist between plaintiff and defendant was not ground for reversal where such instruction obviously was intended to mean that no such relationship of attorney and client would exist as would render defendant liable.

**4. Trial ⇐219**

Instruction on doctrine of joint venture was not erroneous for failure to define "joint venture," in absence of showing of wherein the absence of definition was harmful or misleading.

**5. Attorney and client ⇐167(3)**

In action for attorney's fees, instruction to the effect that attorney could not recover if he had expressly or impliedly agreed to look for compensation to share of claim sued on, assigned by defendant to others, was not erroneous as charging that lawyer whose fee is on a contingency basis cannot recover judgment against client.

---

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by H. E. Manning against Constance May Gavin and others, to recover attorney's fees. From a judgment on a verdict for named defendant, the action having been dismissed as against other defendants, plaintiff appeals.

Affirmed.

Philip R. McEnerney, of San Francisco, for appellant.

Leslie L. Heap, of Los Angeles, and J. Thaddeus Cline, of San Francisco, for respondent.

KNIGHT, Justice.

[1] This is an appeal by plaintiff from an adverse judgment entered in accordance with the verdict of a jury in an action to recover the sum of $24,000 alleged to be due as attorney's fees. Constance May Gavin, her husband John P. Gavin, and Eugene Aureguy were named as parties defendant, but at the opening of the trial appellant dismissed the action as to Mrs. Gavin's husband and Aureguy, and it was tried against Mrs. Gavin, alone, with the result that the jury returned a verdict in her favor. The sole ground of appeal is, as it is stated at the beginning of appellant's opening brief, that the trial court included in its charge to the jury several instructions proposed by respondent which "had the effect of directing a verdict in a case where there was a direct conflict in the evidence." In order to determine the question thus presented the challenged instructions must, of course, under well settled rules, be read in connection with the others given, and interpreted in the light of the issues raised by the pleadings and the evidence upon which they purport to have been based; and when that is done, it becomes apparent that the construction appellant would have placed upon them cannot be sustained.

With respect to the pleadings, the record shows that the cause of action sued upon was stated in two counts. In the first it was alleged in substance that Mrs. Gavin claimed to be a daughter and pretermitted heir of James L. Flood, deceased, and as such was entitled to two-ninths of his estate; that on August 17, 1926, she assigned an undivided one-half interest in her claim to Aureguy; that "between on or about June 17, 1926, and March 1, 1934, at the special instance and request of defendants herein, plaintiff rendered and performed legal services for defendants in the prosecuting of said claim * * *, and in the preparation of said claim for trial, and in counseling and advising said defendants on said claim, and (that) said defendants agreed and promised plaintiff that they would pay him for said services if and when a compromise and settlement of said claim was consummated"; that on or about

February 28, 1934, said claim was compromised and settled, and that the reasonable value of his services was $25,000, no part of which had been paid except $1,000. The allegations of the second count were substantially the same as those of the first except that the portions of the first count above quoted and the allegation relating to the compromise and settlement were omitted and in lieu thereof it was alleged that on or about February 28, 1934, said defendants became indebted to plaintiff in the sum of $25,000 for legal services rendered by him at their special instance and request in preparing and prosecuting Mrs. Gavin's claim of heirship, and giving advice with respect thereto, no part of which sum had been paid except $1,000. So far as appears from the record, no answer was filed by Aureguy; but the Gavins filed a joint answer wherein they denied the allegations of the first count above quoted; also those of the second count hereinabove mentioned; and they set out in its entirety the written instrument referred to in the complaint embodying the assignment of the interest to Aureguy; furthermore, by way of special defenses they pleaded payment in full for whatever services appellant claims to have rendered in connection with respondent's claim of heirship, and that the demand sued upon was barred by the statute of limitations.

The important facts shown by the evidence are these: Mrs. Gavin entered into four separate written contracts of employment relating to the establishment of her claim of heirship. The first was made on June 30, 1926, with attorneys Coffey & Coffey, and provided merely for the payment of a contingent fee of thirty-three and a third per cent. Shortly afterwards Coffey & Coffey brought in attorney Geo. K. Ford, of the firm of Ford, Johnson & Bourquin, as associate counsel, and thereupon a new contract was made with both firms. It was dated July 22, 1926, and besides providing for a contingent fee of thirty-three and a third per cent contained a provision to the effect that the attorneys agreed "to arrange with some other person or persons to investigate and to finance said matters", but that in no event was Mrs. Gavin to pay a total amount in excess of fifty per cent of her interest in said estate—that is, in case it became necessary to pay in excess of sixteen and two-thirds per cent for investigation and financing, said attorneys agreed to reduce the amount of their fees accordingly. As soon as attorney Ford became associated in the case he selected Aureguy (not an attorney) as investigator; but immediately afterwards certain disagreements arose between Aureguy and the Coffeys and the latter withdrew from the case. Upon their retirement the instrument embodying the assignment of interest to Aureguy, referred to in the complaint and set out in the answer, was negotiated by Aureguy and signed by him and Mrs. Gavin. It was dated August 17, 1926, and worded as follows: "Whereas, Constance M. Gavin, of Los Angeles, California, claims that she is an heir at law of James L. Flood, deceased, who left estate in San Mateo County, California, and requires an investigation of said claim and financial assistance in said investigation and the prosecution of said claim; Now, therefore, said Constance M. Gavin hereby employs Eugene Aureguy, of San Francisco, California, to investigate and prosecute said claim and hereby assigns to him an undivided one-half (½) interest in any and all property which may be awarded her by compromise, settlement or judgment in said matter. *Said Eugene Aureguy hereby agrees to investigate said claim and to pay all expenses connected therewith and with the prosecution of said claim, including expenses of attorneys and other matters incidental thereto.*" (Italics ours.) About the time of the execution of said instrument or shortly thereafter, the firm of Ford, Johnson & Bourquin initiated the necessary proceedings to establish Mrs. Gavin's claim of heirship, and thereafter they continued to act as her attorneys and appeared of record as such in all matters connected with said claim until April, 1931, at which time Aureguy, in the exercise of the authority granted by his contract, informed Mrs. Gavin that he had selected Messrs. John J. Taaffe and Maxwell McNutt to act as her attorneys in the place of Ford, Johnson & Bourquin, and on April 17, 1931, pursuant to Aureguy's instructions, Mrs. Gavin entered into a new agreement with attorneys Taaffe and McNutt which was substantially in the same form as the Aureguy agreement, including an assignment of an undivided one-half interest in her claim to Messrs. Taaffe and McNutt; furthermore, it contained a recital of the cancellation of the Aureguy agreement of August 17, 1926, and appended thereto was a cancellation thereof signed by Aureguy. The Taaffe-McNutt agreement "had the effect", so Mrs. Gavin testified, "of nominally transferring the fifty

per cent of Aureguy's into the name of Taaffe and McNutt. Aureguy remained in control of the case as before. The only change being in counsel." Thereafter attorneys Taaffe and McNutt conducted all legal proceedings relating to the prosecution of Mrs. Gavin's claim. The trial took place in Redwood City during the summer of 1931, and resulted in a directed verdict against Mrs. Gavin; but on appeal a reversal was ordered by the Supreme Court. Estate of Flood, 217 Cal. 763, 21 P.2d 579. The decision was rendered in April, 1933, and on February 28, 1934, Mrs. Gavin's claim was compromised and settled; whereupon one-half of the total she received in said settlement was divided equally between attorneys Taaffe and McNutt on the one side, and Aureguy on the other, and in addition she paid to them out of her half the sum of $12,000, of which Aureguy received $7,000 and attorneys Taaffe and McNutt $5,000.

Appellant was brought into the case by Aureguy in July of 1926. He was at that time a resident of and maintained his principal law office in Vallejo; but he had an office also in the Mills building in San Francisco next to the offices of the Ford firm and shared a reception room with Aureguy, who was carrying on the business of investigator. Acting under instructions from attorney Ford, Aureguy had already taken charge of the investigations connected with Mrs. Gavin's claim of heirship, and shortly after having done so he introduced appellant to the Gavins, stating to them at the time, so they testified, that appellant was his assistant. They further testified that appellant made the same statement not only then but on several subsequent occasions. After being so introduced appellant under the direction of Aureguy assisted him in various ways in making many of his investigations. There was very little activity from 1927 to 1930, practically all of the investigation having been carried on in 1926 and from 1930 to the time of trial in 1931; and during those periods appellant, as stated, devoted part of his time aiding Aureguy in his work. Also at various times he talked with Mrs. Gavin about matters under investigation. Usually Aureguy was present; and on a few occasions, under the direction of Aureguy, he accompanied Mrs. Gavin to different places to examine or check records or to interview prospective witnesses. At Aureguy's request also he made one trip east, alone, to obtain certain information. Appellant admitted, however, that he took no part whatever in any of the court proceedings nor in the preparation of any of the pleadings or other court papers relating to the establishment of Mrs. Gavin's claim; that he never appeared as her attorney of record, made any court appearances for her, or participated in the taking of any depositions; and that he was present only once in Redwood City during the trial. But in support of his claim that respondent was liable for the payment of his services, he relied on a conversation which he asserted took place between him and the Gavins in 1926, shortly after he was introduced to them by Aureguy and following a visit he made with them at the direction of Aureguy to the office of Coffey & Coffey to ask for the return of certain articles theretofore left with them by Mrs. Gavin. According to appellant's testimony Mrs. Gavin at that time said to him: "* * * we (referring to herself and husband) appreciate your interest in our battle, I would like to have you stay with us to protect us and our interests, that no matter what lawyer might handle the case against the Flood Estate, we, my husband and myself, referring to her husband, stay with us and advise us." At the conclusion of appellant's testimony respondent moved for a nonsuit and after some discussion the court stated that unless appellant could point out some evidence in the record other than the single conversation above mentioned, he had failed to establish a case, because there was nothing in the conversation as related by him to sustain the allegation in his complaint that "said defendants agreed and promised that they would pay him for said services if and when a compromise and settlement of said claim was consummated". The next morning appellant asked for and obtained permission to reopen his case, and upon taking the witness stand was asked to relate the conversation again, and he answered: "* * * As I heretofore stated it was around the first or second week of August, 1936, at which time she stated, we, referring to herself and her husband—'appreciate what I had been doing for her, I want you to stay with us in this battle, I want you to protect our interests and no matter what lawyer or lawyers handle the Flood Estate case for us we want you to advise and protect our interest *and if I receive anything from the Flood Estate case of my claim, in that event we will pay you and I will pay you.*'"

(Italics ours.) In response to a question asked on cross-examination appellant stated that "last night" was the first time he recalled that part of the conversation above italicized. Thereupon the motion for nonsuit was denied.

Respondent in presenting her case to the jury freely admitted that appellant had assisted Aureguy in the manner above described in carrying on his investigations; but she and her husband positively denied that his services were rendered at their instance or request, or that they promised, directly or indirectly, to pay him for anything he was about to do or had done in that behalf; they also denied ever having solicited or received any legal advice whatever from him, or having received any information from him about the case which had not already been imparted to them by Aureguy; and they specifically denied that the conversation related by appellant ever took place. In addition respondent introduced affirmative evidence which amply supports the conclusion that from the beginning it was understood by appellant as well as by herself and her husband that appellant's services had been invoked by and that he was working for those with whom Mrs. Gavin had entered into written contracts of employment, and that he looked to those parties, and not to her, for the payment of his services out of the fifty per cent share she had assigned to those parties. That appellant had knowledge of the provisions of those contracts is not disputed; in fact he was present at the time the Aureguy contract was negotiated and signed; moreover all expense money required by him in the pursuance of his investigations was supplied by Aureguy. Part of the evidence introduced by respondent to show that such was appellant's understanding consisted of two conversations, the first of which took place, so the Gavins testified, at their home in Los Angeles shortly after Mrs. Gavin executed the Aureguy agreement of August 17, 1926, assigning to him one-half of her claim. The agreement was obtained, it seems, by Aureguy and signed by Mrs. Gavin in San Francisco in the absence of her husband, and upon her return to Los Angeles she informed her husband what she had done. He was much displeased about the matter, and in response to a letter written by him Aureguy and appellant went to Los Angeles to explain matters. At that time, so the Gavins testified, Aureguy and appellant both assured them that the fifty per cent she had assigned to Aureguy "would cover everything, attorneys fees, investigating and financing"; that appellant in so expressing himself stated, "* * * the fifty per cent will cover everything, me and any other attorneys, or anybody else who might be necessary to carry on, it also covers the financing research work, and all further litigation". The other conversation took place, so they testified, in Los Angeles soon after Mrs. Gavin had settled in full with Messrs. Taaffe and McNutt. With respect thereto the Gavins testified that appellant at the time was paying them a social visit; that just before leaving he complained that inasmuch as Mrs. Gavin, out of the one-half share she had received from the Flood estate, had paid Aureguy an extra $7,000 and attorneys Taaffe and McNutt an extra $5,000, he "should come in for at least $5,000"; that they told him at once that such claim was "outrageous," and that they had no intention of doing anything of the kind; that they knew "and he knew that he was to look to Mr. Aureguy for recompense," but that nevertheless they had intended to give him two or three hundred dollars for his kindness to Mrs. Gavin. Thereupon, so Gavin testified, appellant's attitude became milder and he went on to say that Aureguy was hard pressed for money—that he could not get anything from Aureguy, and that he would appreciate the Gavins doing something for him because he was in need of it. Continuing, Gavin testified that they then wrote appellant a check for a thousand dollars for which he thanked them and in departing said they would never regret it, and that he would be only too glad to be of assistance to them in the future. There was more conflicting evidence adduced, of lesser importance, but the foregoing would seem to be quite enough, without going into greater detail, to clarify the points urged by appellant against the instructions, and to prove that they are without substantial merit.

[2] The first instruction about which complaint is made (No. 13) was to the effect that appellant had admitted "the genuineness and due execution" of the Aureguy contract of August 17, 1926. The instruction was based on section 448 of the Code of Civil Procedure, and was clearly applicable in view of the fact that appellant filed no affidavit denying the genuineness and due execution of said contract. But appel-

lant objects to the form of the instruction, contending that since it followed the language of said code section, the jury might have inferred from the use of the words "genuineness and due execution" that it was precluded from considering whether the Aureguy contract was "spurious". The answer to the objection is that at no time did appellant or anyone else claim said contract was spurious. Quite to the contrary, as shown by the affirmative allegations of the fourth paragraph of appellant's complaint relating to the assignment of the interest to Aureguy, appellant took the position from the beginning that it was a bona fide contract.

[3] The jury was further instructed in substance (No. 27) that if it found that Aureguy was an independent contractor (as that term was defined in the preceding instruction) under agreement with respondent to investigate and prosecute her claim, and as such hired appellant as attorney to perform the services for the payment of which he was then seeking to hold respondent liable, the relationship of attorney and client would not exist between appellant and respondent, and that in the absence of such relationship no recovery could be had against respondent. The point urged by appellant is that a relationship of that kind would exist between Mrs. Gavin and any attorney hired by Aureguy under the authority of his agreement, and that since appellant's action was for the recovery of fees for services arising out of such a relationship the instruction operated to his prejudice. It is evident, however, that when the instruction is read in the light of the evidence and in connection with other instructions given, the obvious meaning to be gathered therefrom is that if Aureguy as an independent contractor hired appellant and no agreement was made by Mrs. Gavin to pay appellant for his services, no such relationship of attorney and client would exist between appellant and Mrs. Gavin as would render her liable for the payment of appellant's services. In other words, following the dismissal of the action by appellant as to Aureguy, the sole theory upon which he sought to recover against Mrs. Gavin alone was that apart from any hiring by Aureguy Mrs. Gavin made a separate oral contract with him whereby she promised to pay him for his services. In thus stating his position in his opening brief appellant says: "The only issue that remained at the close of the testimony was whether Mrs. Gavin had made the above promise"; and the record shows that in response to that issue the court gave instructions proposed by appellant whereby it was made perfectly plain to the jury that if it believed that Mrs. Gavin did make such promise she was liable for the payment of said services. One of the instructions so given was as follows (No. 39): "* * * if you find from the evidence that the plaintiff has performed for and rendered to the defendant legal services, with her consent, since June 17th, 1926, and that there was an agreement between them either before or after they were performed as to compensation for said services if and when a compromise or settlement of the claim or controversy in connection with which they were rendered or performed was consummated, and that such a compromise and settlement has been consummated, then the plaintiff has the right to recover for such services and you will find for the plaintiff a reasonable value for such services, as shown by the evidence." Another instruction given at appellant's request based upon the same legal doctrine was number 36. Even assuming, therefore, that the legal principle embodied in instruction 27 might have been stated with more clarity, the giving thereof in its present form falls far short of serving as ground for reversal.

[4, 5] Instruction 28 relates to the doctrine of joint venture. Appellant's only comment thereon is that "Joint venture is not defined and the instruction is misleading on the testimony given." No attempt is made to point out wherein the absence of such definition was harmful or the jury was misled; and where that is not done, no error is shown. The objection made to instruction 29 is that it makes a person's legal liability for services rendered in his behalf dependent upon his knowledge or belief that the person performing the services looks to him for payment. An examination of the record shows, however, that appellant's objection is based entirely upon the last clause of the instruction, and it becomes apparent upon reading the major portion of the instruction that appellant's objection is overcome thereby. The ground of complaint against instruction 31 is that the jury was informed thereby "that a lawyer whose fee is on a contingency basis, cannot recover a judgment against the client". There is no merit in such complaint. As applied to the facts of this case, the instruction was merely to the effect that

despite the general rule that the law implies a promise to pay for services rendered, if it clearly appeared that appellant expressly or impliedly agreed to look for his compensation to the undivided half of the claim of inheritance assigned by Mrs. Gavin to others, he could not recover against Mrs. Gavin. Lastly, appellant takes exception to the concluding four lines of instruction 32. With respect thereto he states that the fact that he performed services at the request of both Aureguy and attorney Ford "would not be a legal bar to a promise made by Mrs. Gavin to pay for such service". Conceding that to be true, there is nothing in the instruction, when read in its entirety, implying a contrary meaning.

After having analyzed the entire charge of the court, which consisted of more than forty separate instructions, we have found nothing therein to warrant the belief that the court interfered in any manner with the right of the jury to consider fully or decide fairly all issues of fact presented by the pleadings and the evidence.

The judgment is therefore affirmed.

We concur: PETERS, P. J.; WARD, J.




38 Cal.App.2d 24

**PEOPLE v. GILPIN et al.**

Cr. 3290.

District Court of Appeal, Second District, Division 2, California.

March 14, 1940.

**1. Criminal law ⇐1144(13)**

On defendant's appeal from conviction for first degree robbery, evidence was viewed most favorable to the people.

**2. Robbery ⇐24(1)**

In prosecution for first degree robbery, complaining witness' testimony that on a certain night two masked men entered witness' store and that while one pointed a gun at witness the other went to cash register and took money from it, after which both men left, was sufficient to establish the "corpus delicti." Pen.Code, §§ 211, 211a.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

**3. Robbery ⇐24(3)**

An officer's testimony that defendant voluntarily, without hope of immunity or promise of reward, confessed that defendant and codefendant had robbed a liquor store and that defendant, when taken in officer's automobile, identified complaining witness' store as store which had been robbed, was sufficient to identify defendant as a participant in the robbery. Pen.Code, §§ 211, 211a.

**4. Criminal law ⇐1166½(12)**

In prosecution for first degree robbery, instructing a codefendant, when called to witness stand by defendant, respecting codefendant's constitutional right to refuse to testify on ground that it might tend to incriminate codefendant, was not prejudicial to defendant, especially where trial judge's statement to codefendant was merely a recitation of constitutional guaranty afforded by Constitution. Pen.Code, §§ 211, 211a.

**5. Criminal law ⇐655(1)**

Error could not be predicated upon trial judge's advising a defendant of his rights.

**6. Criminal law ⇐1134(2)**

An unsworn statement of codefendant, which had not been received in trial court and appeared for the first time in defendant's opening brief on appeal, could not be considered.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Thomas E. Gilpin and Amil S. Weller were charged with an offense, and Amil S. Weller appeals from a conviction of robbery in the first degree.

Affirmed.

R. H. Smith and P. V. Davis, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial before the court without a jury, appellant appeals.

[1] Viewing the evidence most favorable to the people, the essential facts are:

February 21, 1939, the complaining witness while in his liquor store at 3415 West Eighth street, Los Angeles, was robbed of $35 by appellant and another masked man.

Appellant relies for reversal of the judgment upon these propositions:

*First: There was no proof of the corpus delicti.*

*Second: There was no substantial evidence to show appellant's participation in the crime.*

*Third: The trial court committed prejudicial error in instructing a codefendant, when called to the witness stand by appellant, of his constitutional right to refuse to testify on the ground that it might tend to incriminate him.*

The first proposition is without merit. The complaining witness, Harry Kaplin, testified that on the night of February 21, 1939, at about midnight, two masked men entered his store, located at 3415 West Eighth street, Los Angeles, and while one pointed a gun at him the other went to the cash register in the store and took $35 from it, after which both men left.

[2] Robbery is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear, and when done by a person armed with a deadly weapon is robbery in the first degree. Secs. 211 and 211a, Pen.Code. We fail to see wherein there could be clearer evidence of the corpus delicti of the crime of robbery in the first degree than in the instant case.

[3] The second proposition is likewise devoid of merit. Police Officer Tetrick testified that appellant freely and voluntarily, without hope of immunity or promise of reward, confessed to him that he and his codefendant Gilpin had robbed a liquor store. Officer Tetrick took appellant in an automobile and drove out West Eighth street in the city of Los Angeles. Appellant picked out the complaining witness' store as the one which they had robbed. This evidence clearly identified appellant as a participant in the crime.

[4, 5] The third proposition is also untenable. At the time of the trial appellant's codefendant was called to the witness stand and the trial judge explained to him in detail that any testimony which he gave might be used to convict him of the charges which were then pending against him, and advised said defendant of his constitutional rights to refrain from giving testimony that might tend to incriminate him. The trial judge's statement is a recitation of the constitutional guaranty afforded by the Constitution of the state of California, and certainly error may not be predicated upon the trial judge's advising a defendant of his rights.

[6] The unsworn statement of Thomas E. Gilpin, which was not received in the trial court and appears for the first time in appellant's opening brief cannot be considered by us for any purpose.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.




**The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a Municipal Corporation, Plaintiff and Appellant, v. E. Bennett ADAMS et al., Defendants and Respondents.**

**The METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a Municipal Corporation, Plaintiff and Appellant v. Lawrence HOLMES et al., Defendants and Respondents.**

**Civ. 2172.**

District Court of Appeal, Fourth District, California.

March 15, 1940.

Hearing Granted April 18, 1940.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Petition for rehearing denied.

Opinion modified.

Prior opinion, 99 P.2d 659.

James H. Howard, Arthur A. Weber, Charles C. Cooper, Jr., Donald M. Keith, Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, for appellant.

Miguel Estudillo, of Riverside, Oliver O. Clark, of Los Angeles, and C. L. McFarland, of Riverside, for respondents.

PER CURIAM.

The respondents urge, in their petition for rehearing, that the interest question "was not properly decided in the other case (Metropolitan Water District v. Adams, Civil No. 2434, as reported in Cal.App., 99 P.2d 675) for the reasons that in that case no transcript was prepared or filed, no briefs were prepared or filed, and a stipulation of the parties was filed in which it was provided that the decision of the interest question in that case should abide the decision of that question in this case." Respondents are in error as to these facts. A transcript is filed in the other case (Civil No. 2434) together with a stipulation that the question of interest "raised by this appeal may be determined upon the briefs filed in, and to be filed in, said cause 99 P.2d 659 and upon the oral arguments, if any in that cause."

The petition for rehearing is denied.




38 Cal.App.2d 8

**STEIN v. COBB et al.**

Civ. 12458.

District Court of Appeal, Second District, Division 2, California.

March 13, 1940.

**1. Action ⇐53(1)**
**Assignments ⇐30**

A creditor may not divide an entire demand into separate parts and maintain a separate action on each part, and he may not assign separate parts of an entire demand to others.

**2. Assignments ⇐30**

An assignment transferring to assignee a cause of action against an author to recover payment of a percentage of all sums realized by author from the sale of moving picture rights in certain literary works which had allegedly been previously sold by author under a contract, to the rights of which assignor had succeeded, and which withheld from assignee any other right accruing to assignor under the contract or rights asserted by the assignor against the author in a named action, constituted a "partial assignment" which could not be enforced against the author without his consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Partial Assignment".

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by A. J. Stein against Irvin S. Cobb and others to recover a sum of money allegedly due under a contract. From an adverse judgment, plaintiff appeals.

Affirmed.

Kornblum & Austrian, of Los Angeles, for appellant.

F. Eldred Boland and Knight, Boland & Riordan, all of San Francisco, for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover the sum of $3,750, alleged to be twenty-five per cent of a sum received by defendant from the sale of the motion picture rights of a work of which defendant is the author. At the close of plaintiff's evidence the trial court rendered a judgment of nonsuit, from which the appeal is taken.

Defendant is the author of a book entitled "Down Yonder With Judge Priest and Irvin S. Cobb", containing eleven or twelve stories. On January 15, 1932, defendant entered into a contract with a publishing firm doing business under the name of Ray Long & Richard R. Smith, Inc., wherein it is provided that "the author hereby grants, assigns, and transfers to the publisher" the work in question. Numerous terms are set forth in the contract, in which the publisher agreed to publish and sell the work, paying the author a certain percentage of the selling price. In the 7th paragraph of the contract it is provided: "This agreement may be assigned by either party as a whole, and the assignee thereof shall have all the rights and remedies of the assignor, but neither party may assign any partial interest herein." In the 14th paragraph of the contract it is provided: "The copyright

and rights herein granted to the Publisher cover the right of dramatization and adaptation for silent and/or talking moving pictures. If the Publisher arranges the sale of any such rights, Seventy-five per cent (75%) of any compensation received shall go to the Author and Twenty-five per cent (25%) to the Publisher."

According to the allegations of the complaint, defendant on March 6, 1935, sold to Twentieth Century-Fox Film Corporation the motion picture rights of the work which is the subject of the contract for the sum of $15,000. Defendant testified that he had made a contract with Twentieth Century-Fox Film Corporation whereby this company had been given the right to use two of the stories contained in the work in question, together with a story taken from another book written by defendant. In his answer defendant alleged that the contract for the publication of the work had been abandoned by mutual consent.

The corporation which had contracted to publish defendant's work became bankrupt and the trustees in bankruptcy assigned the contract to a new corporation, which in turn made an assignment to plaintiff in the following words and figures: "For and in consideration of the sum of One ($1.00) Dollar, and other valuable considerations, receipt of which is hereby acknowledged, the undersigned hereby assigns to A. J. Stein, that certain cause of action existing in favor of the undersigned against Irvin S. Cobb, to recover payment of Twenty-five per cent (25%) of all sums realized by said Irvin S. Cobb from the sale of certain literary materials entitled 'Down Yonder with Judge Priest and Irvin S. Cobb' to Twentieth Century-Fox Film Corporation, all as provided in that certain contract between Irvin S. Cobb and Ray Long and Richard R. Smith, Inc., a Delaware Corporation, dated January 15, 1932, the undersigned having succeeded to the rights of Ray Long and Richard R. Smith, Inc. thereunder. This assignment shall be limited to the right to recover the sum above mentioned and shall not be construed to convey or transfer any other right accruing to the undersigned under said contract or which the undersigned may now possess by virtue of said contract or otherwise, and especially any rights which are now being asserted by the undersigned in that certain action now pending in the United States District Court for the Southern District of New York, entitled 'Ray Long and R. R. Smith Corporation v. Twentieth Century-Fox Film Corporation and Irvin S. Cobb', being No. E 83–129 in the files of said Court."

[1, 2] The trial court granted the nonsuit on the ground that plaintiff's assignment is a partial assignment, defendant having argued that plaintiff has no legal standing to enforce a partial assignment against a debtor who has not consented thereto. The court ruled correctly. A creditor may not divide an entire demand into separate parts and maintain a separate action on each part. In Zirker v. Hughes, 77 Cal. 235, 19 P. 423, it was pointed out that the plaintiff who had a right of action for $952 might if permitted to split his demands at will compel a defendant to pay over $4,000 in costs alone. Since a creditor may not split his cause of action it follows that he may not accomplish the same result by the expedient of an assignment to another. Grain v. Aldrich, 38 Cal. 514, 519, 99 Am. Dec. 423. Plaintiff argues that the assignment is merely for an amount due and relies upon Butler v. San Francisco Gas, etc., Co., 168 Cal. 32, 141 P. 818, and Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 P. 51, but these cases do not assist him for the reason that although the contracts which gave rise to the causes of action were unassignable, the actions were commenced for moneys due after the rendition of the services called for by the contracts. In the case now before us it will be noted that although the assignment specifically refers to a cause of action involving the sum realized by defendant from the sale to Twentieth Century-Fox Film Corporation of the motion picture rights in the work in question, the assignment clearly withholds from the assignee any other right accruing under the contract which the assignor "may now possess by virtue of said contract or otherwise". The assignment further withholds the rights which are "now being asserted" by the assignor in an action in the federal court in New York in which the assignor as plaintiff and defendant and Twentieth Century-Fox Film Corporation are named as defendants. The allegations of the complaint in the New York case are not before us. Indeed, defendant claims that since he was not served up to the time of the trial in the present action he is unaware of the contents of plaintiff's complaint in the other case. The assignment shows on its face

that the assignor made only a partial assignment and no proof was presented by plaintiff to negative this prima facie showing.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.




37 Cal.App.2d 720

**MEYER v. THOMAS et al.**

**Civ. 11070.**

District Court of Appeal, First District, Division 1, California.

March 13, 1940.

Rehearing Denied April 12, 1940.

See 100 P.2d 1066.

**1. Fraudulent conveyances ⇐299(12)**

In suit against husband and wife and an individual to set aside conveyances and a mortgage as fraudulent in respect to creditors where wife and individual, after verdict was returned against them but before entry of judgment in action commenced in 1935 for conversion, to which husband was not a party, conveyed and mortgaged the land to husband, evidence authorized conclusion that deed claimed to have been made by wife to husband in 1934 with respect to property owned by husband and wife as joint tenants was never effectually delivered and that wife did not intend to divest herself of title by such deed.

**2. Husband and wife ⇐264**

The holding of property in joint tenancy by spouses indicates that property is not community property but that spouses have separate interests therein.

**3. Fraudulent conveyances ⇐299(12)**

In suit against a husband and wife and an individual to set aside conveyances and a mortgage as fraudulent in respect to creditors, where part of property which had been conveyed by wife to husband had been owned by wife and husband as joint tenants, evidence did not show an intention by husband and wife to own their interests therein other than as separate property.

**4. Execution ⇐56**

Execution may be levied upon the interest of a tenant in common.

**5. Fraudulent conveyances ⇐215**

A creditor whose claim arises out of a tort is entitled, upon recovering judgment, to have a fraudulent conveyance set aside.

**6. Fraudulent conveyances ⇐225**

Where plaintiff, instead of resorting to equity to recover real estate acquired by defendant in connection with conversion of a note secured by a deed of trust, brought an action at law and recovered a money judgment against defendant, in subsequent suit against defendant, defendant's husband and an individual to set aside, as fraudulent with respect to creditors, a conveyance by defendant of the land to defendant's husband, plaintiff was not "estopped" from asserting fraud by defendant and husband as to manner in which they acquired the land, especially where wife's actions were ratified by husband.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

**7. Husband and wife ⇐265**

A wife may be agent of husband, who controls community property, and husband may be liable as head of the community, and personally, for wife's actions.

**8. Fraudulent conveyances ⇐181(1)**

If a conveyance is intended to defeat creditors, it is voidable.

**9. Husband and wife ⇐269**

Where money judgment against a wife in action for conversion of note, which was secured by deed of trust covering land, was founded upon wife's tort and wife, as consequence of use of community funds, obtained the land by fraud, and husband ratified wife's acts and colluded with wife to prevent plaintiff from getting settlement of judgment by accepting a deed to land from wife, the land was subject to execution to satisfy the judgment, notwithstanding that land may have been community property. Civ.Code, § 167, as amended by St.1937, p. 1497, § 2, and § 171a.

**10. Fraudulent conveyances ⇐299(12)**

In suit against a husband and wife and an individual to set aside conveyances and a mortgage as fraudulent in respect to creditors, where wife and individual, after ver-

**dict was returned against them but before entry of judgment in action for conversion, to which husband was not a party, conveyed and mortgaged land to husband, evidence justified findings that conveyances were fraudulent and should be set aside.**

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Suit by Stanley H. Meyer against Elizabeth Thomas and others, to set aside conveyances and a mortgage as fraudulent in respect to creditors. From a judgment for plaintiff, defendants appeal.

Affirmed.

John F. O'Sullivan, of San Francisco, for appellants.

Arthur J. Healy, William E. Barden, and Frank J. Needles, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment setting aside conveyances and a mortgage as fraudulent in respect to the creditors of Elizabeth Thomas, Charles H. Thomas and Charles DeBold.

The action arises out of a former suit, wherein the court, sitting with a jury in an advisory capacity, rendered judgment against Elizabeth Thomas and Charles DeBold. Meyer v. Thomas, 18 Cal.App.2d 299, 63 P.2d 1176. The facts as there found by the court, 18 Cal.App.2d pages 301, 302, 63 P.2d page 1177, are as follows: "Anna Marie Meyer died intestate, leaving as heirs two sons, the defendant Herbert F. Meyer and the plaintiff Stanley H. Meyer. Prior to the commencement of the administration of the estate and for the purpose of facilitating the distribution of said estate, plaintiff assigned to defendant Meyer his interest in and to said estate. Comprising part of said estate was a promissory note for $6,500 secured by a deed of trust on certain property on Dolores street, San Francisco, executed by defendant DeBold, and which property the court found to be worth $2,500. Defendant Meyer borrowed $250 from defendant Elizabeth Thomas, and to secure the repayment of said loan he assigned and transferred to her the DeBold note and deed of trust. Defendant Thomas knew at all times that plaintiff had an interest in and to part of the estate and thereby to the DeBold note, which interest had never been renounced, repudiated or disclaimed by plaintiff. Before this action was commenced defendant Meyer assigned the said note to plaintiff, and plaintiff twice tendered to defendant Thomas $250 and demanded return of the note, but the tenders and demands were by her refused. Soon after the second tender DeBold, without the consent of plaintiff, conveyed by deed his interest in said property to defendant Thomas, who thereupon surrendered to him the promissory note and deed of trust in question. No sale was had under the deed of trust, and the sole consideration for the conveyance was the surrender of the note by defendant Thomas to DeBold. The court further found that the defendants Thomas and DeBold converted said promissory note and deed of trust to the use and benefit of the defendant Thomas, and deprived plaintiff of his right, title, and interest in said note and deed of trust, and gave judgment in plaintiff's favor for $4,444.12, which was the value of the note less the amount of the $250 loan and interest."

Subsequent to the return of the verdict in that case, but prior to the entry of judgment, Elizabeth Thomas deeded to her husband, Charles H. Thomas, who had not been a party to the action, premises at 1265 Dolores street, as well as certain parcels of land in Calaveras county, and Charles DeBold mortgaged to Charles H. Thomas premises at 1267 Dolores street. The present action was instituted to set aside these three instruments.

The trial court in the present action found that defendant Charles Thomas engaged in a course of conduct with his wife Elizabeth and Charles DeBold, which left the two defendants last named, and each of them, without sufficient, or any, property to satisfy the judgment against them, and that Charles Thomas had knowledge of the fraudulent intention in connection with the execution of the instruments.

On the trial of this case, defendants contended that the mortgage on premises at 1267 Dolores street was given for a consideration. During oral argument on appeal they agreed that judgment as to the cancellation of the mortgage be affirmed, and they subsequently entered into a stipulation that the judgment "decreeing to be void that certain mortgage on the real

property described as 1267 Dolores Street, San Francisco, California, be, and the same may be affirmed".

With reference to the Calaveras county property, it is appellants' contention that such property had been held by Mr. and Mrs. Thomas as joint tenants; that prior to the institution of the suit of January, 1935, which led to the judgment for conversion, Mrs. Thomas had transferred such property to her husband by deed dated September 14, 1934, acknowledged September 18, 1934, but not recorded; that such deed omitted a certain parcel of land and that on November 5, 1935, she executed a second deed, including this omitted property, which was recorded November 6, 1935.

[1] Appellants do not challenge the sufficiency of the evidence to support the finding that these transfers were made with fraudulent intent. There is support in the evidence presented and the reasonable inferences that may be drawn therefrom to justify the conclusion that the 1934 deed to the Calaveras property was never effectually delivered. Mrs. Thomas testified that this deed was prepared because she had been sued for $50,000 by a party who "had tried to blacken my name all she could, but she could not succeed". Mr. Thomas was, at least, confused in his testimony relative to the time and circumstances of delivery. In view of the fact that the property was not community property, but was held in joint tenancy, and that the transfer was made with fraudulent intent, we must agree with the trial court that the wife never intended to divest herself of title. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003.

[2-5] The holding of property in joint tenancy indicates that the property is not community property, but that the spouses have separate interests therein. As said in Estate of Harris, 9 Cal.2d 649, 659, 72 P.2d 873, 878: "Upon the creation of the joint tenancy ownership, each owned their interest therein as separate property." The evidence in this case does not show a contrary intention. Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513. Execution may be levied upon the interest of a tenant in common. Lynch v. Cunningham, 131 Cal. App. 164, 21 P.2d 154, 973. A creditor whose claim arises out of a tort is entitled, upon recovering judgment, to have a fraudulent conveyance set aside. Adams v. Bell, 5 Cal.2d 697, 56 P.2d 208; Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St.Rep. 62.

[6] With reference to the deed from Elizabeth Thomas to her husband covering premises at 1265 Dolores street, appellants in their reply brief state: "Conceding that Elizabeth Thomas had obtained the property by fraud in the first instance, respondent here had the right to have a court of equity restore the property to him. (Gorham v. Gilson, 28 Cal. 479, 483.)" It is appellants' contention that where respondent did not take the property, but received a money judgment in its place, he is now estopped from asserting any fraud on the part of Elizabeth or Charles Thomas as to the manner in which they acquired the 1265 Dolores street property. In other words, to quote from appellants' reply brief, if respondent was seeking for the first time to recover the property "appellants could not hide behind the cloak of community property". When the wife converted the pledged note and deed of trust, and accepted transfer of the real property from DeBold, the deed was made to her and title of record continued in her name until the transfer to her husband, subsequent to which date, however, she attempted to sell the property to a third party. Thomas told his wife "to get a deed made out in his name, and put it on record", which was a ratification of the wife's actions in the whole transaction. Hulsman v. Ireland, 205 Cal. 345, 270 P. 948; Althof v. Conheim, 38 Cal. 230, 99 Am.Dec. 363; Wetzel v. Simon & Co., 87 Tex. 403, 28 S.W. 274; Richburg v. Sherwood, 101 Tex. 10, 102 S.W. 905.

[7] This brings us to the major contention of appellants, namely, that the judgment in favor of plaintiff in the former action was founded upon a tort of Elizabeth Thomas, and that the property referred to as 1265 Dolores street, conveyed to Charles Thomas by his wife, being community property, is not subject to execution to satisfy a judgment for such tort. In this connection, appellants rely upon Smedberg v. Bevilockway, 7 Cal.App. 2d 578, 46 P.2d 820. That decision is not based upon a state of facts similar to those with which we are here confronted. In the Smedberg case, the court, at page 581, of 7 Cal.App.2d at page 821 of 46 P. 2d says: "At the instance of the wife her interest could be segregated by a mutual contract between her and her hus-

band (Civ.Code, § 159); or in a divorce action (Civ.Code, § 146); or a separate action based on a divorce action (De Godey v. Godey, 39 Cal. 157); or, on her death, by reason of the provisions of her will. Probate Code, § 201. Our statutes provide no other methods." Further, the court said, 7 Cal.App.2d page 581, 46 P.2d page 821: "But it is not claimed that either before or after the enactment of section 161a of the Civil Code the community property or the separate property of the husband was liable for the contracts of the wife made after marriage unless secured by a pledge or mortgage thereof executed by the husband. The statute provides it was not. Civ.Code, § 167." Since the rendition of the decision in that case, and subsequent to transactions involved in the present one, section 167 has been amended to read as follows: "The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by pledge or mortgage thereof executed by the husband. Except as otherwise provided by law, the earnings of the wife are liable for her contracts heretofore or hereafter made before or after marriage." Stats. 1937, chap. 508, p. 1497, § 2. This change is indicative that recent legislative action tends to a modification of the rule followed in Smedberg v. Bevilockway, supra; at least to the extent that the earnings of the wife, which become community property, are liable for her contracts, without execution by the husband of any pledge or mortgage. In the Smedberg case, there was no question of fraud. In the instant case it is apparent that fraud taints the entire transaction. In the Smedberg case, the question of the agency of the wife, representing her husband in the disposition of community property was not raised. Here, the evidence proves knowledge on the part of the husband of the actions and intent of the wife, and his ratification thereof by acceptance of the benefits of the fraudulent transaction. That the wife may be the agent of the husband, who controls the community property, and that the husband may be liable as head of the community, and personally, for the actions of the wife, see Hulsman v. Ireland, supra, wherein it was held that the wife could bind the community as agent of the husband, and that ratification of acts performed may tend to establish agency. Schader v. White, 173 Cal. 441, 160 P. 557.

Section 171a of the Civil Code provides: "For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." In the Smedberg case there was no claim that the husband would have been jointly liable with the wife had the marriage not existed. In this case it appears that the husband was a joint tort-feasor with the wife in the conversion of the property; he, at least by acquiescence, permitting his wife to use community funds in making the original loan of $250, for which she received an assigned note for $6,500 secured by a deed of trust. It is only fair to note in this connection, however, that the property secured by the deed of trust was eventually found to be worth only $2,500. Meyer v. Thomas, supra. The husband, Charles Thomas, though not a defendant in the original action, would have been jointly liable with the wife "if the marriage did not exist". Civ.Code § 171a, supra. Plaintiff and respondent, in the presence of Charles Thomas, who took part in the conversation, tendered payment of the sum for which the note was pledged. The tender was refused. Subsequently the husband accepted a deed from Elizabeth Thomas covering the property, in which deed a consideration of $2,000 was recited; Thomas testified the property was worth $1,500. On the day following the recordation of the 1265 Dolores street deed, the wife withdrew from two San Francisco banks all sums on deposit, totaling $2,894, which she testified was the purchase price paid to her by her husband for this property. The funds so withdrawn were on deposit to the credit of Charles H. Thomas or Elizabeth Thomas, payable to either of them.

[8, 9] As stated, the question of fraud did not arise in Smedberg v. Bevilockway, supra. Under these circumstances, even if the rule of the Smedberg case were applicable to a situation where the wife, through the use of community funds, has secured property by her fraud, and where the husband has no knowledge of and has not participated therein, a point we do not decide, the rule could have no application to the facts of this case. Here the evidence demonstrates that the husband knew of and participated in the fraudulent transaction. In a final attempt to prevent the respondent from securing redress for that fraud, the husband accepted a deed to the premises. Under such circumstances

the ordinary rules appertaining to fraudulent conveyances apply. The collusion between the husband and wife in this case, from its inception, to defraud Herbert F. Meyer, deceased, and his assignee Stanley H. Meyer, and to prevent them from obtaining a just settlement for the DeBold note and deed of trust, was established. If a conveyance is intended to defeat creditors, it is voidable. Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838. If the transaction is permitted to stand, the wife and the husband would "reap the fruit of the fraud". Kemp v. Enemark, 194 Cal. 748, 753, 230 P. 441, 443. In that situation not only is there legal justification for subjecting the community property to execution to satisfy the money judgment for the tort of the wife, but manifestly justice and fairness demand that this be done. Lynch v. Cunningham, supra.

[10] The findings and conclusions of law, that the conveyances and each of them are fraudulent, and should be decreed to be void and of no effect and set aside, in accordance with the prayer of the complaint, are hereby upheld.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.




38 Cal.App.2d 1

## FIDELITY & CASUALTY CO. OF NEW YORK v. FIREMAN'S FUND INDEMNITY CO.

Civ. 11088.

District Court of Appeal, First District, Division 1, California.

March 13, 1940.

Hearing Denied May 9, 1940.

1. Insurance ⇐604

Where two or more insurers fully insure the same risk and one company pays total loss, that company may force contribution from the others.

2. Insurance ⇐604

Where both policies contain a pro rata or coinsurer clause the insurers are to be deemed "coinsurers" and not "cosureties," and neither can recover from the other any amount that may have been paid in excess of its pro rata share of the entire loss sustained by the insured.

See Words and Phrases, Permanent Edition, for all other definitions of "Cosureties" and "Coinsurers".

3. Insurance ⇐604

Where public liability policies issued by two insurers contained a coinsurance or pro rata clause limiting liability, neither insurer could be required to pay more than its pro rata share of the entire loss sustained by assured, and insurer which paid the full amount of such loss was a mere volunteer as to the excess and was not entitled to contribution from the insurer which denied liability.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Fidelity & Casualty Company of New York, a corporation, against the Firemen's Fund Indemnity Company, a corporation, for contribution on settlement of a claim for personal injuries by employee of insured to whom both plaintiff and defendant had issued liability policies. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

PETERS, Presiding Justice.

This is an action between two insurance companies, both of which had issued policies covering the liability of the Union Paving Company, for personal injuries suffered by one J. F. Gallagher when his automobile was struck by a truck, owned by the insured and operated by one of its employees. It is conceded that the accident occurred as the result of the negligence of the truck driver, and because the truck was equipped with faulty brakes. The policy of the plaintiff, the Fidelity & Casualty Company of New York, covered liability growing out of the use and operation of the insured's motor vehicles while the insured was engaged in performing a specified contract for the state of Nevada. The policy of defendant, Fireman's Fund Indemnity Company, covered

liability of the insured growing out of injuries occurring on the premises of the insured. The particular injury here involved occurred on the premises of the Paving Company. After the accident the plaintiff negotiated a settlement with Gallagher for the sum of $8,100. Thereupon, claiming that it had paid the full $8,100 to Gallagher, plaintiff commenced this action against defendant to recover from it a proportionate part of the settlement. From a judgment for defendant that plaintiff take nothing, this appeal is prosecuted.

The facts giving rise to this controversy, so far as necessary to dispose of this appeal, are as follows:

Plaintiff issued its policy to the Union Paving Company covering a one-year period starting March 15, 1935. Defendant issued its one-year policy to the same company April 11, 1935. Each policy not only covered liability of the insured, but contained the usual clauses requiring the insurer to investigate accidents, conduct negotiations for settlements and to defend suits at its own expense. Each policy also contained the usual provisions requiring the insured to give the insurer prompt written notice of any accident, and prompt notice of any claim made on account of such accident, and requiring the insured to immediately forward to the insurer every summons or other process served upon him. Each policy also contained a coinsurance clause. The clause contained in the Fireman's Fund policy reads as follows: "If the Assured carries a policy of another insurer against any loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance."

The comparable clause in the Fidelity policy reads as follows: "If the Insured carries insurance other than the insurance under this policy against a loss covered by this policy, the Insured shall not be entitled to recover from the Company a larger fractional part of the entire loss than that indicated by the ratio of the amount of this policy to the total amount of his valid and collectible insurance against such loss."

The accident in which Gallagher was injured occurred June 4, 1935, in Nevada. The insured promptly notified plaintiff but did not notify defendant. Gallagher filed suit against the Paving Company in Nevada on July 1, 1935. The Paving Company immediately sent the complaint and summons to plaintiff. The plaintiff investigated the accident and carried on negotiations with Gallagher looking towards a settlement of his claim. The defendant had no notice or knowledge of the accident, claim, or suit until August 1, 1936, some fourteen months after the accident. On that date it received a letter from plaintiff informing defendant of the accident and also stating that plaintiff believed defendant was also liable on the risk. Also, early in August, 1936, the Paving Company wrote to defendant informing defendant of the accident, and also stating that the letter was being sent at the request of plaintiff. On August 24, 1936, after several conferences with plaintiff's representatives, defendant orally advised plaintiff that it was denying liability under its policy because of the delayed notice to it and on other grounds.

Fidelity continued its negotiations with Gallagher looking toward a settlement. Fireman's Fund refused to participate. On October 29, 1936, after a conference with plaintiff defendant wrote to plaintiff and to its insured, the Paving Company agreeing that any settlement made by Fidelity would not prejudice any right Fidelity might have against Fireman's Fund as coinsurer, but reserving to defendant its right to deny liablity under its policy. On November 5, 1936, Fidelity settled Gallagher's claim for $8,100. Plaintiff, however, did not pay all of this sum directly to Gallagher. It first entered into a written agreement with the Paving Company, which recites the pertinent facts, and then states that plaintiff is willing and agrees to pay one-half of the settlement and will "lend" to the Paving Company the other one-half. This "loan", it was agreed, should be repaid to plaintiff "by the amount recovered, if any" by plaintiff or the Paving Company from defendant, but if no recovery is made then the "loan" was to be canceled. Acting pursuant to this agreement, plaintiff paid $4,050 to Gallagher, and advanced $4,050 to the Paving Company. That company then paid Gallagher the balance of the settlement, that is, $4,050.

On this evidence, by proper findings, the trial court decided in favor of defendant on three separate theories. It first held that, in view of the pro rata clause contained in the two policies, each company was liable for only one-half the liability of the Paving Company; that under such circumstances when the plaintiff paid more

than its pro rata share, under well-settled principles, no right of contribution existed as against defendant.

In the second place, it held that defendant is not liable because the insured breached the notice and cooperation provisions of the policy issued by defendant, and that defendant did not waive such violations.

In the third place, it found that plaintiff cannot recover from defendant, even if a right of contribution did exist, because the evidence shows that plaintiff only paid $4,050, the amount for which it was admittedly liable, and did not pay to Gallagher the other $4,050; that the transaction between the Paving Company and the plaintiff did not constitute a payment to Gallagher but was a loan to the Paving Company.

Obviously, if any one of these three theories is sound, the judgment must be affirmed. Because of our conclusion that no right of contribution exists under the facts here presented, it will not be necessary to discuss the other two theories found by the trial court.

[1, 2] It is appellant's theory that plaintiff and defendant insured the same risk, and were, in legal effect, cosureties as to that risk, and that, as between cosureties, the right of contribution exists. The authorities hold that, where two or more insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the others. Sutton v. Franklin Fire Ins. Co., 209 N.C. 826, 184 S.E. 821; Commercial Casualty Ins. Co. v. Knutsen Motor T. Co., 36 Ohio App. 241, 173 N.E. 241. This is a sound rule. Appellant concedes, however, that all of the cases heretofore decided, including one case from California, hold that where both policies contain a pro rata or coinsurer clause, the insurers are to be deemed coinsurers and not cosureties, and neither can recover from the other any amount that it may have paid in excess of its pro rata share of the entire loss sustained by the assured. This principle is clearly stated in 14 California Jurisprudence, page 594, section 128, as follows: "Where each of several policies insuring a piece of property contains a provision limiting the liability of each company to its proportion of the loss, each company is liable directly to the insured for such proportion; and the payment by one of a larger amount in no way affects the liability of the others and gives the one so paying no right to recover the excess paid from the other insurers."

In Fireman's, etc., Co. v. Palatine Ins. Co., 150 Cal. 252, page 256, 88 P. 907, page 908, the court, referring to the above rule, stated: "It is well settled that there is no right of contribution among insurers whose policies contain such a clause." The following cases state the same rule: Globe Nat. Fire Ins. Co. v. American Bonding & Casualty Co., 205 Iowa 1085, 217 N.W. 268, 56 A.L.R. 463; Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 25 A. 989, 3 Am.St.Rep. 386, affirmed in 77 Md. 64, 27 A. 314, 3 Am. St.Rep. 386; Rochester German Ins. Co. v. Schmidt, 4 Cir., 175 F. 720; Southern Surety Co. v. Commercial Casualty Ins. Co., 3 Cir., 31 F.2d 817; American Casualty Co. v. Maryland Casualty Co., D.C., 20 F.Supp. 561. The reason behind this rule is clearly stated in the Hanover Fire Ins. Co. case, supra. In that case the court first pointed out that if each insurer there involved had bound itself to pay the entire loss, then if one of them paid the entire loss it would have a right of contribution against the others, because such company would then have paid a debt which was equally and concurrently due by the others. As all were equally bound, all should contribute to the payment. But this rule, states the court, has no application where the policies contain pro rata clauses. The court discusses this phase of the problem as follows (25 A. at page 991): "But in the different policies concerned in this case there is no concurrent liability. Each insurer, by the distinct terms of his contract, makes himself liable for a certain and definite fractional part of the loss, to be calculated in the manner stipulated in the policies. In this case the defendant contracts to pay the proportion of the loss which the amount insured by it bears to the whole sum insured on the property in all the policies, and it is stated in the evidence that the other policies had substantially the same stipulation. The contracts are entirely separate and independent of each other. Each insurer binds himself to pay his own proportion of the loss, without any reference to what may be paid by the others. If they pay more or less than they are bound to pay, or if they do not pay anything, it in no manner concerns him. If in this case the other insurance companies had paid the whole loss, they would have had no right of contribution from the defendant, and neither would such

payment have discharged any portion of the defendant's liability to the insured."

These cases establish that in the event of double insurance, since each company insures for the full amount, if one pays the full loss it may force contribution from the other. But coinsurance is pro rata insurance and neither company can be required to pay more than its share. If it does, the excess payment is purely voluntary, and contribution cannot be claimed from the other.

Appellant does not challenge the well-settled rule stated by these cases, but points out that, with the exception of the case American Casualty Co. v. Maryland Casualty Co. in 20 F.Supp., 561, supra, none of them deals with public liability policies, but all deal with fire insurance or deposit insurance policies. It is contended that in such cases the amount of loss is fixed or is capable of exact determination, whereas in public liability cases the amount of liability cannot be known until fixed by a court or by a compromise, and, in fact, the question of whether there is any liability cannot be fixed except in the same fashion. Appellant states "that coinsurance clauses are only applicable where an insured has sustained a loss and where no other obligation is left upon the coinsurers with respect thereto than to pay the amount of the loss." It is appellant's theory that, if the Paving Company had been forced to pay Gallagher the $8,100, then that company would have suffered a "loss", as that term is used in the coinsurance clauses quoted, supra, and could only recover one-half from each of the insurance companies, and, if one voluntarily paid more than its share, no right of contribution would exist, but, it contends here, the insured, Paving Company, did not incur a loss but only an unliquidated liability that the term "liability" is not included within the term "loss" as used in the policies; that the insured was not compensated for a loss, but a claimant against the insured was so compensated; that the duty of both insurance companies was to protect the insured against the unliquidated liability; that in such a case the pro rata clause can have no application. Appellant concedes that the American Casualty Co. case in 20 F.Supp. 561, supra, applied the rule of the fire and deposit insurance cases to public liability insurance, but points out that in that case the claim of the insured against his two insurance carriers had been reduced to judgment. Appellant also points out various difficulties that may arise if it be held that no right of contribution exists.

[3] We are not convinced of the merits of appellant's contentions. As already indicated, these pro rata clauses have a well-settled meaning, a meaning that has never been departed from in any case heretofore decided. The term "loss" as used in the coinsurance clauses here in question, and in other places in the same policies, obviously was used in its broad sense. To give the interpretation to this clause suggested by appellant would be to render the coinsurance clause practically meaningless. It must be held that, when appellant issued its policy to the Paving Company containing the clause in question, a clause which had uniformly been interpreted in other types of policies to deny the right of contribution, it intended this same legal effect should flow from the use of this clause in its policy. If a different intent existed it would have been a simple matter to have used appropriate language to express that intent.

In view of this conclusion the other two theories upon which respondent relies to sustain the judgment need not be considered.

The judgment appealed from is affirmed.

We concur: KNIGHT, J; WARD, J.




37 Cal.App.2d 708

**PEOPLE v. O'BRIEN.**

**Cr. 3305.**

District Court of Appeal, Second District, Division 1, California.

March 11, 1940.

1. Criminal law ⇐238, 561(1)

The doctrine of reasonable doubt applies in determining sufficiency of evidence to support conviction of felony, but only slight evidence is sufficient to justify magistrate's order holding defendant to answer in superior court.

2. Gaming ⇐98(5)

Evidence *held* insufficient to sustain conviction of keeping and occupying an apart-

**ment for purpose of recording and registering bets on horse races. Pen.Code, § 337a, subd. 2.**

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Patrick O'Brien was convicted of keeping and occupying an apartment for the purpose of recording and registering bets on horse races, and he appeals.

Reversed.

A. Brigham Rose, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was found guilty by the court sitting without a jury of a violation of subdivision 2, section 337a, of the Penal Code, in that he kept and occupied an apartment for the purpose of recording and registering bets on horse races.

This appeal is prosecuted from the judgment of conviction and from the order denying a motion for a new trial upon the grounds: (1) that the evidence is insufficient to sustain said judgment; (2) that the trial court "essayed to usurp the functions of an appellate tribunal" which was evidenced by its declaration to the following effect: "When you submit a case on the (preliminary) transcript, you are submitting it to the same effect that a transcript would be submitted to an appellate court. In other words, the question of credibility is out and the sole question is as to whether there can be gleaned from the transcript sufficient evidence to warrant an ultimate conclusion of guilt."

By stipulation the cause was submitted upon the transcript of evidence adduced at the preliminary hearing which consisted solely of the testimony of one of the arresting officers, Edgar A. Like. This evidence disclosed that said officer arrested "the defendants" about 2:15 in the afternoon of August 8, 1939, in an apartment containing three rooms located on an upper floor of an apartment house on North Vine street in the city of Los Angeles; that the only person present in the front room of the apartment when said officer entered the place was a man named James Houghton, who was sitting before a table upon which some run-down sheets were spread out. Other betting paraphernalia, i. e., A. B. C. betting markers and inventories of the day's business were introduced in evidence, the function of which with respect to bookmaking was explained by said officer Like. In this connection, he testified that he checked the entries on the betting markers against the overnight rundown sheets, and "found that all of the numbers on the betting markers were numbers of horses running on this particular date". He also testified that there were three telephones in the apartment (two alive and one dead), as well as a teleflash which was on the table before which defendant Houghton was sitting with a telephone receiver in his hand; that he did not see Houghton write on any of the papers and did not hear him say anything; that officer Morgan brought the "two defendants, Conterno and Louis" into the room and that the two officers then "questioned all four of them in there and continued our search and then took them down to the station". The witness Like was then interrogated as follows:

"Now have you told the court everything you saw or heard any of these three defendants do before they were placed under arrest? A. I believe I have.

"Q. Well, after you put the defendants under arrest did you have a conversation with the defendant Houghton? A. No, sir, officer Morgan questioned all of the defendants."

Upon cross-examination officer Like stated that he and officer Morgan entered the apartment with a Chinese pass key and found only one person in the apartment seated at the table. He was then asked,

"How long were you in that apartment with Houghton before the other men were brought in? A. Approximately five minutes.

"Q. How long did you remain in the apartment? A. Approximately fifteen or twenty minutes, I should say.

"Q. And the men were standing and seated? A. They were. * * *

"Q. And did you handcuff them before you left the apartment? A. We did not handcuff them at all.

"Q. You walked out with them? A. That is right.

"Q. And just before you walked out you found this key under the couch, didn't you? A. I saw the defendant, James Houghton, drop it there.

"Q. And you saw him drop it there when? A. When I told him to sit down on the couch. * * *

"Q. When did you tell him to sit down on the couch? A. When the phone rang and he picked up the phone and I told him to sit down and let it alone.

"Q. And it was done there in the presence of all the other defendants? A. That is right, and I saw him drop it before they came in.

"Q. But you didn't pick it up immediately? A. No. sir, I was busy at the time.

"Q. Where were you seated or standing at the time you saw these keys drop? A. There was a folding bed that opens out, and it was up. There are two doors and I was standing behind one of the doors writing the information that I heard over the teleflash down on my note book, and I was watching the defendant at the time."

Presumably, the witness here refers to the defendant Houghton, whom he said he had been watching ever since he saw him drop the key.

On redirect examination, the witness was questioned as follows:

"Q. Was the teleflash in operation at the time when you first entered the room? A. It was. I wrote down a whole lot that it said.

"Q. What did you hear in that respect? * * * A. When we first entered the room where the defendant Houghton was sitting, the teleflash said, 'They are at the gate at Thistle Down.'"

At this point, the witness narrated at length what he had heard coming over the teleflash.

After this, said witness was again cross-examined as follows:

"Q. All the time you were listening to this the defendant O'Brien was there alone, is that right? A. That is right.

"Q. You and he were there alone? A. That is true.

"Mr. Kenney: Move that it be stricken as not admissible as to the other defendants.

"The Court: Motion to strike granted.

"Mr. Kenney: That is all."

Whereupon the testimony of the officer as to what he had heard over the teleflash was stricken as not being admissible as to the defendants, other than O'Brien.

Except for this last above-quoted testimony, the name of appellant O'Brien nowhere appears in the transcript of the preliminary hearing. Even the attorney-general in his brief makes the statement: "We believe it may be conceded that there is no testimony in the transcript which connects the appellant O'Brien with any of the activities in the apartment except the question propounded to the officer by the defense counsel above quoted."

There appeared to be no doubt in the officer's mind that he saw James Houghton alone in the apartment when he first entered, and that said Houghton was sitting at a table upon which were spread out certain bookmaking paraphernalia, consisting of various papers, telephones and a teleflash; that he saw said Houghton drop a key and thereafter, while listening to the race returns coming over the teleflash, he kept Houghton in sight. The record is silent with respect to the part played by appellant O'Brien at the time and place in question, his name and those of defendants Conterno and Louis having been mentioned but once in the testimony of officer Like, which, as hereinbefore stated, is the only evidence presented in the cause herein. There is not the slightest intimation in the record before this court that defendant James Houghton and the appellant O'Brien are one and the same person, although the trial court in a colloquy with defense counsel at the close of the trial made the following comment: "I think the transcript shows sufficient evidence to sustain the prosecution. * * * Presence and the—* * * fact he was using the telephone, and the fact he had a key to the place." The record does not bear this out. Appellant undoubtedly was present, but there is no evidence that he was either using the telephone or had a key to the apartment.

[1] What was said by this court in the opinion in People v. Fisk, 32 Cal.App.2d 26, 30, 89 P.2d 142, 144, is particularly applicable to the facts in the instant cause: "There is a great difference between the legal requirements with regard to what evidence is necessary to justify the order of a magistrate in holding a defendant to answer to the superior court, and that which is necessary to support a judgment of 'Guilty'. The doctrine of reasonable doubt applies to the latter, whereas but slight evidence is sufficient to justify the

former. To be accused of, and placed on trial for, a felony manifestly cannot be regarded as a trivial matter, and the perfunctory disposition of such an action can scarcely be said to be in accord with that form usually followed and recognized in connection with the administration of justice. Nor can the conviction of a felony be judicially regarded as a mere experience of no consequence in the ordinary course of events."

[2] The evidence adduced as to appellant O'Brien does nothing more than raise a mere suspicion of guilt, and is totally insufficient to sustain the judgment of conviction. In view of such conclusion, it is deemed unnecessary to pass upon appellant's second point.

The judgment and order appealed from are, and each of them is, reversed.

We concur: DORAN, J.; WHITE, J.




38 Cal.App.2d Supp. 773

**PEOPLE v. BIGMAN.**

**C. A. 1680.**

Appellate Department, Superior Court, Los Angeles County, California.

March 11, 1940.

**1. Criminal law ⇐307**

Generally, state Legislature may provide by statute that proof of certain facts shall constitute prima facie or presumptive evidence of other facts, if there is natural and rational evidentiary relation between facts proved and those presumed.

**2. Criminal law ⇐327**

The burden of proof in criminal prosecutions may be lifted from state and cast on defendant by statute, where state has proved enough to make it just to require defendant to repel what has been proved with excuse or explanation or shifting of burden will aid accuser without subjecting accused to hardship or oppression.

**3. Automobiles ⇐6**

The statutory prima facie presumption that registered owner of illegally parked motor vehicle was person who parked it is valid. Vehicle Code, § 591, St.1939, p. 1489.

**4. Criminal law ⇐304(2)**

It is matter of common knowledge, of which Superior Court may take notice, that it is impractical for city of size of Los Angeles to maintain police force large enough to detect personally any substantial portion of violators of vehicular parking law, such as section thereof prohibiting parking in front of private driveway. Vehicle Code, § 586(e), St.1935, p. 192.

Appeal from Municipal Court of Los Angeles; Louis W. Kaufman, Judge.

Sam Bigman was convicted of illegally parking an automobile, and he appeals.

Affirmed.

Henry R. Thomas, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SCHAUER, Judge.

Defendant appeals from a judgment of conviction in an automobile parking case wherein the corpus delicti—the illegal parking of the automobile—was established by stipulation but in which there was no direct proof of the identity of the operator of the automobile. The sufficiency of the evidence to sustain the essential implied finding that defendant was the person who parked the vehicle (or directed its parking) depends on the validity of the presumption declared by section 591 of the Vehicle Code (added by Stats. of 1939, Chap. 231 (p. 1489), hereinafter quoted). That section provides that upon proof of certain facts and under the circumstances therein enumerated an evidentiary prima facie presumption shall arise that the registered owner of a motor vehicle was the person who parked it. Defendant challenges this presumption as being irrational, unconstitutional and void. We find it valid.

Specifically defendant stands convicted of violating section 586(e) of the Vehicle Code which provides in material part that "No person shall * * * park * * *

any vehicle * * * (e) In front of a * * * private driveway." St.1935, pp. 191, 192. At the trial it was stipulated that, in violation of the above quoted section, on January 16, 1940, a certain automobile, bearing 1939 California state license number 4R-94-12, was stopped and parked on a public street in the City of Los Angeles in front of, and so that it obstructed the use of, a private driveway. It was further stipulated that defendant, at all times concerned, was the registered owner of the offending automobile. There was no evidence tending to prove the identity of the defendant, or any other person, as the guilty party, other than such stipulated facts, the inferences which may be drawn therefrom and the presumption hereinabove mentioned.

That presumption, with its conditions, is set forth in section 591 of the Vehicle Code, which reads as follows: *"Illegal Parking.* (a) In any prosecution charging a violation of any regulation governing the standing or parking of a motor vehicle under this code or any ordinance enacted by local authorities, proof by the people of the State of California that the particular vehicle described in the complaint was parked in violation of any provision of this code or such ordinance, together with proof that the defendant named in the complaint was at the time of such parking the registered owner of such vehicle, shall constitute in evidence a prima facie presumption that the registered owner of such motor vehicle was the person who parked or placed such motor vehicle at the point where, and for the time during which, such violation occurred. The above provisions shall apply only when the following conditions are complied with:

"(1) During the time of such illegal parking a notice thereof shall be securely attached to said vehicle setting forth the fact of such illegal parking including reference to the section of this code or of such ordinance so violated, the approximate time thereof and the location where such violation occurred and fixing a time and place for appearance by the registered owner in answer to said notice.

"Such notice shall be attached to said vehicle either on the steering post or front door handle thereof or in such other conspicuous place upon the vehicle as to be easily observed by the person in charge of such vehicle upon his return thereto.

"(2) Before any warrant of arrest shall issue following the filing of a complaint charging the offense of illegal parking, a notice of such illegal parking must be given to the person so charged. Such notice shall contain the information required in paragraph (1) above and shall also inform such registered owner that unless he appears in the court to be designated in said notice within five days after service of such notice and answers said charge, a warrant or citation to appear will be issued against him.

"Such notice shall be given, either by personal delivery thereof to such owner or by deposit in the United States mail of an envelope with postage prepaid which said envelope shall contain such notice and shall be addressed to such owner at his address as shown by the records of the department. The giving of notice by personal delivery is complete upon delivery of a copy of said notice to said person. The giving of notice by mail is complete upon the expiration of ten days after said deposit of such notice.

"Proof of giving such notice may be made by the certificate of any traffic or police officer or affidavit of any person over eighteen years of age naming the person to whom such notice was given and specifying the time, place and manner of the giving thereof."

It was also stipulated that the notices required by the above quoted subsections (1) and (2) were respectively securely attached to the steering post of the automobile and given to the defendant personally. The sole question presented for our determination is the validity of the declared prima facie presumption that defendant was the person who unlawfully parked the vehicle.

[1, 2] Throughout this state and the United States it is a generally accepted rule that the legislative body of a state may provide by statute that proof of certain facts shall constitute prima facie or presumptive evidence of other facts, if there is a natural and rational evidentiary relation between the facts proved and those presumed therefrom. People v. Fitzgerald, 1936, 14 Cal.App.2d 180, 191, 58 P.2d 718. As articulated by Mr. Justice Cardozo, speaking for the Supreme Court in Morrison v. California, 1934, 291 U.S. 82, 88, 89, 54 S.Ct. 281, 284, 78 L.Ed. 664, 669, "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal

prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Mr. Justice Lurton, in Mobile Jackson & Kansas City R. Co. v. Turnipseed, 1910, 219 U.S. 35, 42, 43, 31 S.Ct. 136, 137, 55 L.Ed. 78, 80, 32 L.R.A., N.S., 226, Ann.Cas.1912A, 463, expressed the rule as follows: "Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. * * * That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

In respect to the effect of the legislative presumption and the operation of the presumption of innocence, Mr. Justice Sutherland in Yee Hem v. United States, 1925, 268 U.S. 178, 184, 185, 45 S.Ct. 470, 472, 69 L.Ed. 904, 906, for the Supreme Court, says, "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. * * * The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article [in that case, opium] prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

[3] We are satisfied that the presumption declared by the statute which we are considering cannot be held invalid as tested by the standards which are noted in the cases from which we have quoted or in any other cases cited to us which are authoritative in this jurisdiction. Relationship between the registered owner of an automobile and its operation is natural; if he is not the operator on any occasion that fact is directly within his knowledge and in the ordinary course of events can easily be proved with such certainty as almost entirely to exclude the possibility of a false conviction. The presumption we are dealing with is not a presumption which either creates a crime or establishes the fact that a crime has been committed. On the contrary it arises only after proof by competent evidence that an offense, including all essential elements thereof, has been committed by some person and that such offense has been committed by and through the use of an instrumentality which defendant has caused to be registered in the public records of the state in his name and which by virtue of such registration he is primarily, of all persons in the state, entitled to use. The inference that a parked automobile was parked by its registered owner is not an unreasonable or unnatural one; without other evidence tending with some certainty to exclude the possibility that it was parked by another, that inference would not within the rules of circumstantial evidence support a finding of guilt against the presumption of the owner's in-

nocence; but this is exactly such a situation as manifestly justifies the legislature in artificially adding to that proof by means of the declared presumption, for reasons of convenience, and purely as a tentative basis for further proceedings, the equivalent of prima facie evidence that others did not, and hence that defendant did, park the vehicle at the time involved (proof of its illegal parking by someone being an essential part of the conditions precedent to the arising of the presumption).

[4] Obviously this is such a case as comes well within the limits fixed by Mr. Justice Cardozo when in Morrison v. California, 1934, supra, 291 U.S. 82, 88, 89, 54 S.Ct. 281, 284, 78 L.Ed. 664, 669, he said that "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." The great convenience to the state through operation of this presumption in the proof of identity of operators in cases of illegal parking on the thousands of miles of highways in the state or to the officers of a municipality in enforcing the laws within the more limited but still relatively extensive public streets therein, is readily apparent. It is a matter of common knowledge, of which we may take notice, that it would be, and has in fact been, impractical for a city the size of that wherein this prosecution arose (Los Angeles; and we do not doubt that the same is relatively true in municipalities throughout the state) to maintain a police force large enough to personally detect any substantial portion of vehicular parking law violators by observing them in the act of illegal parking or by discovering the illegally parked vehicle and awaiting the return of the absent operators. The extent of the convenience to the state, it seems apparent to us, will far outweigh such inconvenience as may be occasioned to some registered owners whose automobiles when used by others may be illegally parked and result in the owners having to appear and answer the charges. In such instances, however, except in the comparatively rare cases of stolen or unlawfully moved cars, the owners can protect themselves by permitting their automobiles to be used only by persons who will be responsible to them for any unlawful parking of the vehicles. In any event, the inconvenience is basically caused not by the operation of the presumption of identity of the operator but rather by the violation by the actual operator of the substantive law involved. In no way whatsoever does the operation of the presumption preclude the owner from his right to challenge the fact as to who did operate the vehicle.

Appellant urges that this court in the case of People v. Forbath, 1935, 5 Cal.App. Supp.2d 767, 42 P.2d 108, declared a rule to which the presumption here involved is obnoxious. We intended and find no such implication in that case, nor is there any legal similarity therein to the case now before us. The city ordinance on which that prosecution was based ordained that "it shall be unlawful for any person * * * to allow, permit or suffer any vehicle registered in his * * * name as registered owner thereof, to stop, stand or park * * * upon * * * any street * * * in violation of any provision of this ordinance" and on that enactment it was sought to hold the registered owner of an automobile criminally liable for its illegal parking regardless of the fact as to who parked it and regardless of whether the registered owner had either knowledge of, or control over, the illegally parked car or its operator. Such ordinance did not attempt to declare an evidentiary rule of procedure; it purported, if interpreted as the state then urged, to impose a substantive law fixing guilt. It did not establish a prima facie presumption or shift the burden of procedure; instead, if the conviction therein was to be upheld, it conclusively established guilt of one who might be innocent and did not permit him to challenge the truth of the presumed fact if the legally conclusive but factually inconclusive premise of registered ownership was admitted. We held that the terms "allow," "permit" and "suffer," as used in that ordinance, all implied "knowledge of, coupled with a duty and power to prevent, the particular act or omission, the allowance, permittance or sufferance of which, constitutes the offense," and on that basis found the evidence insufficient to support the conviction. Such holding has no significance in the present case.

We are of the opinion that the presumption which has been discussed herein is rational to its factual premise, that it materially aids the state to prima facie proof of a

matter peculiarly within the knowledge of the defendant and, without the presumption, difficult for the state to establish by reason of the mechanics incident to the gathering of evidence, that its operation is reasonable, imposes no hardship on the defendant, and deprives him of no constitutional right. We therefore hold section 591 of the Vehicle Code to be valid. The judgment is affirmed.

SHAW, P. J., and BISHOP, J., concur.




39 Cal.App.2d Supp. 765

**PEOPLE v. BANAT.**

**Cr. A 1678.**

Appellate Department, Superior Court, Los Angeles County, California.

March 12, 1940.

**1. Automobiles ⇐351**

A complaint, charging motorist with operating an automobile at speed of 43 miles per hour, and in a careless and reckless manner without due regard to traffic, surface and width of the highway, and so as to endanger the life, limb, and property of other persons in a so-called 25-mile zone, did not charge the offense of speeding in absence of allegation that speed at which automobile was driven was not reasonable or prudent and that speed at which it was driven endangered safety of persons or property. Vehicle Code, § 510, St.1935, p. 176.

**2. Indictment and Information ⇐144**

Though complaint did not state facts constituting offense of speeding, complaint should not have been dismissed with prejudice, but should have been dismissed for the purpose of permitting an amendment to avoid statutory bar to further proceedings. Pen.Code, § 1387; Vehicle Code, § 510, St. 1935, p. 176.

**3. Automobiles ⇐316**

The statute penalizing the driving of vehicle on highway at a speed greater than is reasonable or prudent or at a speed which endangers the safety of persons or property is valid, and one may be validly charged with a crime by a complaint which sets forth a violation of its terms. Vehicle Code, § 510, St.1935, p. 176.

**4. Constitutional law ⇐46(1)**

Where defendant was charged with violating section 510 of the Vehicle Code, and complaint was dismissed for failure to state a cause of action, Superior Court reversing judgment on appeal was not required to consider the constitutionality of section 511 creating disputable presumptions to be observed in determining whether the basic speed law of section 510 had been violated, since the question of presumptions could be of interest only at trial, and did not affect the sufficiency of the basic charge. Vehicle Code, § 510; § 511, par. 2, St.1935, p. 176.

Appeal from Justice's Court of San Antonio Township, Stanley Moffatt, Judge.

Phyllis Ann Banat was charged with speeding, and, from an order dismissing proceeding with prejudice, the People appeal.

Reversed with directions.

Buron Fitts, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., both of Los Angeles, for appellant.

Nixon A. Lange, of Huntington Park, for respondent.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, amici curiæ.

BISHOP, Judge.

An attempt was made, in a complaint sworn to before the trial judge, to charge the defendant with speeding. At the suggestion of the defendant but on the court's own motion, the case was dismissed with prejudice, before trial, the grounds given for the dismissal being that the provisions of section 510 and of paragraph 2 of section 511 of the Vehicle Code are unconstitutional, and that the complaint states conclusions of law rather than ultimate facts. From the order of dismissal the People have appealed. We have concluded that so far as they are brought into question at this stage of the prosecution, the Vehicle Code provisions are valid; that the complaint is faulty, but not for the reasons given; and that the order dismissing the case was proper, except that it should not have been with prejudice, but should have been for the purpose of amending the complaint.

[1] The complaint charged that the defendant had operated a vehicle (an automo-

bile) on 18 December 1939 on Firestone Boulevard near Bandera Street, in San Antonio Township, "at a speed in excess of 25 miles per hour, to wit: 43 miles per hour, and in a careless and reckless manner, without due regard to the traffic, surface and width of the said highway and so as to endanger the life, limb and property of other persons at said time and place." Further words indicate that the offense thus attempted to be charged occurred in a so-called twenty-five mile zone. This complaint does not state a public offense known to any existing state law or local ordinance of which we are aware. With this conclusion of the trial court, expressed in the opinion filed in support of its order, we are in agreement: there is no law which makes the speed of 43 miles per hour, even in a twenty-five mile zone, of itself unlawful. See Knox v. Pryor, 1935, 10 Cal.App.2d 76, 78, 51 P.2d 106, and case cited. Speed may be unlawful, but to be so it must offend the basic speed law which is expressed in section 510, Vehicle Code: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

In the trial court's opinion and in the arguments before us it has been assumed that the complaint was based on the section just quoted. A comparison of the section and of the complaint, however, proves the assumption to be ill founded. After stating the speed charged against the defendant, the complaint proceeds to characterize the manner in which the vehicle was operated as being careless and reckless, words not appearing in section 510. Furthermore, should it be conceded that "not reasonable or prudent" and "careless and reckless" are synonymous, the section applies the former to the *speed* at which a vehicle is driven, the complaint applies its substituted words to the *manner* of driving, which may well include many factors other than speed. The additional words of the complaint "and so as to endanger the life, limb and property of other persons" are descriptive, again, of the *manner* of operation; they do not charge a violation of the provision of section 510 that "in no event" shall one drive "at a *speed* which endangers the safety of persons or property." This complaint might well have survived attack many years ago, see Ex parte Murphy, 1923, 190 Cal. 286, 293, 212 P. 30, for its counterpart, but sections 20 and 22 of the Vehicle Act (Stats.1919, pp. 215, 220) there under review, have undergone many changes and neither section 510 nor any other present provision of law known to us, serves to save the complaint in its present form.

[2] While it was proper, therefore, for the trial court to dismiss the complaint, the grounds expressly given for the dismissal indicate that it was believed that where the charge is speeding, a public offense can not be stated and hence the dismissal was ordered with prejudice. We are of the opinion that this State does have a speed law; that a complaint can be drafted stating an offense based on speed; and that as the only tenable ground for dismissing the action was the faulty wording of the complaint, the dismissal should be for the purpose of permitting an amendment, to avoid the statutory bar to further proceedings, which the present order constitutes. Section 1387, Penal Code; People v. Ring, 1937, 26 Cal.App.Supp.2d 768, 770, 70 P.2d 281.

The trial court held: "That Section 510 of the Vehicle Code is violative of the state and federal constitutions as being too indefinite for any defendant to determine whether he is or is not violating the law." The same criticism had been leveled at section 505 of the Vehicle Code which prior to 1939 began: "Any person who drives any vehicle upon a highway in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving." It is obvious, we think, that the same principles are involved in the present attack on section 510 as were involved in that on section 505. The trial court was evidently of this opinion, for in support of its conclusion that section 510 is bad, it cited a decision of the Superior Court of Mariposa County, rendered in April 1938, wherein a complaint based on section 505 was held insufficient on the asserted ground that it and the code were both too indefinite. The trial court failed to refer to the more recent case of People v. Smith, Cal.Super., 1939, 92 P.2d 1039, wherein a complaint based on section 505 was upheld, many cases being cited where statutory provisions no more definite than those here attacked were upheld as valid and where the court quite plainly indicated its belief in the legal sufficiency of section 510, Vehicle Code.

Among the cases cited in People v. Smith, supra, was Ex parte Daniels, 1920, 183 Cal.

636, 192 P. 442, 21 A.L.R. 1172, in which our supreme court had under consideration the argument that section 22 of the Vehicle Act (Stats.1919, p. 220) was too indefinite in its provision that: "Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper." The court after some discussion of the problem gave its decision in these words (183 Cal. page 647, 192 P. page 447, 21 A.L.R. 1172): "We must hold that the provision making it unlawful to travel at an unreasonable or unsafe speed and punishing the violation of such law as a crime is valid and constitutional legislation."

Gallaher v. State, 1923, 193 Ind. 629, 141 N.E. 347, 29 A.L.R. 1059, is a case so parallel with ours that it is worthy of notice; it even appears that the unlawful speed was 43 miles per hour in a twenty-five mile zone. Of greater significance, however, is the fact that the provisions of the statute (Burns' 1914, § 10476c) involved were almost identical with those of section 510: "No person shall drive or operate a motor vehicle or motor bicycle upon any public highway in the state at a speed greater than is reasonable or prudent, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person." Objection was made that these provisions were so uncertain and indefinite that they were void. The Indiana Supreme Court after reviewing many cases determined that the provisions of the statute before it were not uncertain and indefinite but were valid and enforceable.

[3] We have no hesitancy in declaring it to be our opinion that section 510, Vehicle Code, is an enforceable penal statute, and that one may be validly charged with a crime by a complaint which sets forth a violation of its terms.

Another ground advanced in support of the trial court's order of dismissal was that the second paragraph of section 511, Vehicle Code, is unconstitutional. This section prefaces a number of provisions prescribing what are termed prima facie speed limits, applicable under varying conditions, as for example twenty-five miles in a business or residence district, with these two paragraphs:

"The speed of any vehicle upon a highway not in excess of the limits specified in this section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 hereof.

[4] "The speed of any vehicle upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in section 510 hereof at the time, place and under the conditions then existing."

Plainly what the legislature has attempted to do is this: (1) Provide a rule of substantive law in section 510, creating the offense of speeding; (2) provide rules of adjective law in section 511, creating disputable presumptions to be observed in determining whether or not the basic speed law of section 510 has been violated. So understanding the purpose and effect of section 511 we conclude that the constitutionality of the provisions of section 511 is not a pertinent subject of inquiry before trial. If, as the trial court declared its belief to be, the legislature cannot constitutionally declare that a speed in excess of the rates therein fixed is to be presumed in violation of section 510, then there is no such presumption, and at the trial the violation will have to be established, if at all, without its aid. If, however, the provisions of section 511 are valid, as the court evidently believed in Knox v. Pryor, supra, 10 Cal.App.2d 76, 51 P.2d 106, and in Ex parte Moseley, 1935, 6 Cal.App. 2d 654, 45 P.2d 241, then the defendant will have to rebut the presumption or suffer conviction because he drove too fast. But whether we do or do not have a presumption is a question of interest only at the trial; it does not affect the sufficiency of the basic charge. We are expressing no opinion as to the constitutionality of the provisions of section 511, not because we entertain a doubt as to their validity, but because the question is not involved in reviewing a dismissal of the complaint before trial.

For the reasons given, the order dismissing the case with prejudice is reversed with directions to the trial court to dismiss the case for the purpose of filing an amended complaint.

We concur: SHAW, P. J.; SCHAUER, J.

15 Cal.2d 212

## In re LAMPMAN'S ESTATE. PITCHER v. LAMPMAN.

L. A. 16866.

Supreme Court of California.

March 13, 1940.

**1. Executors and administrators ⇐496(2)**

Under statute, "the amount of the estate accounted for" is the base for reckoning commissions of executors and administrators, and once such figure is established the matter of determining the correct statutory fees is merely a matter of computation. Probate Code, § 901.

See Words and Phrases, Permanent Edition, for all other definitions of "The Amount of the Estate Accounted For".

**2. Executors and administrators ⇐495(1)**

The taking possession of property belonging to decedent is one of the tests of whether an executor or administrator is entitled to the allowance of commissions based upon the inclusion of such property in his accounts, but such is not the sole test or the only essential factor to be taken into consideration in determining "the amount of the estate accounted for" by the executor or administrator. Probate Code, § 901.

**3. Executors and administrators ⇐496(2)**

The underlying principle in dealing with question of the "amount of the estate accounted for" by an executor or an administrator for purpose of measuring his commissions is the premise that the measure of the responsibility of executor or administrator is the measure of his compensation. Probate Code, § 901.

**4. Executors and administrators ⇐495(3)**

Generally, where property subject to an incumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the incumbrance. Probate Code, § 901.

**5. Executors and administrators ⇐495(3)**

Where executrix took possession of deceased's apartment, collected income therefrom, and, during course of administration, sold property to purchaser who agreed to pay trust deed against property, which trust deed did not constitute an indebtedness of decedent, executrix was entitled to commissions and her attorney to fees based only upon excess of total sale price over the incumbrance, since executrix was not responsible for the entire purchase price, but only the excess of total sale price over the incumbrance. Probate Code, §§ 901, 910.

**6. Executors and administrators ⇐497**

The power of the probate court to grant executor or administrator or his attorney additional fees for extraordinary services is one which may be used to equalize any injustice which may result when the estate upon which the commissions are allowed is small, and the services involved are extra onerous.

**7. Executors and administrators ⇐501**

The probate court's reduction of the amount to be paid an accountant for services rendered to executrix in preparing her final account could not be set aside, in absence of a showing of an abuse of discretion.

**8. Executors and administrators ⇐109(3)**

The matter of payment to third persons for services rendered an executor rests in discretion of probate court.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Jay B. Lampman, also known as J. B. Lampman, deceased, wherein the first and final account and petition for distribution filed by Marion L. Pitcher, as executrix, were contested by Helen M. Lampman. From certain portions of the judgment approving the first and final account, the executrix appeals.

Affirmed.

Prior Opinion, 92 P.2d 495.

Frank C. Dunham and M. Everett Burton, both of Pasadena, for appellant.

Hahn & Hahn, E. F. Hahn, Jr., and Allyn H. Barber, all of Pasadena, Clock, Waestman & Clock and Newlin & Ashburn, all of Los Angeles, and Richard K. Gandy, of Santa Monica, amici curiae.

Morin, Newell, Brown & Hamill and J. W. Morin, all of Pasadena, for respondent.

CURTIS, Justice.

This is an appeal from certain portions of the judgment approving the first and final account of the executrix of the last will and testament of Jay B. Lampman, deceased. The appeal is taken by the executrix of said will, particularly from that portion of said judgment which related to

the statutory fees of said executrix and her attorney, and also from that portion of said judgment which reduced the fee paid to an accountant for services rendered the executrix both in the preparation of her first and final account and also the income tax return for three years.

The testator at the time of his death was the owner of an apartment house in Glendale, appraised at $42,500, and recently acquired in trade. It was subject to a trust deed which had never been signed by the decedent, and upon which an unpaid balance of $38,000 remained at the time of his death. The executrix took possession of the apartment, managing it through a paid manager, and collecting the rents and paying the operating expenses. The gross income from said property received by the executrix was set forth in said final account as totaling approximately $19,615. During the course of administration the property was sold for $47,500, which sale was confirmed by the probate court. The purchaser assumed the payment of the trust deed and paid to the executrix the difference between the purchase price and the amount due on the trust deed. The actual amount of cash paid to the executrix from this sale was $14,003, as the balance then due on the trust deed was the sum of $33,497.

The executrix presented her petition for distribution and her first and final account to the probate court and sought the approval of the court to the payment of $1,507.09 to herself, as her commission as executrix of the will, and also an equal amount for her attorney, upon the theory that she had therein accounted for a total estate of $67,788.42. The executrix also sought in said final account "a substantial sum" to be fixed by the court to herself, and the sum of $500 to her attorney, for extraordinary services in connection with the management of the estate and sale of the apartment house. The final account of the executrix showed that there was not sufficient money remaining in her hands to pay the allowed claims in full, and that it would be necessary to prorate the payments of said claims. Respondent, who is the principal creditor, filed objections to the payment of the amount of statutory fees claimed by said executrix, and also to the payment by the estate of $75, paid by the executrix to an accountant for the preparation of federal and state income tax returns for the year 1936, and the payment of $150 to the same accountant for services rendered the executrix in connection with the preparation of said final account and the preparation of income tax returns for the years 1937 and 1938.

Upon the hearing of said account the court upheld the objections thereto, and made the following findings:

"A. The court finds that at the date of the death of the above named decedent, there was a Trust Deed of record on the real property belonging to the said estate upon which there was due approximately $35,000, and that said real property was sold by the said executrix, said sale having heretofore been approved and affirmed by the said court for the sum of $47,500, the said purchaser paying to the said executrix the sum of $14,003, and agreeing to assume and pay the holder of said Trust Deed the balance then due on the said Trust Deed, to-wit, the sum of $33,497.

"B. The court further finds that there has been no claim filed by the holders of said Trust Deed with the said executrix and that because of the foregoing facts there should be first deducted from the total amount of the Estate accounted for by said executrix, to-wit, the sum of $67,799.42, the sum of $33,497, being the amount due on said encumbrance, as hereinbefore set forth, leaving net balance of said estate to be accounted for by said executrix, in the sum of $34,302.42 upon which the statutory fee for the said executrix and her said attorney should be fixed, making the fee of said executrix and her said attorney in the sum of $1016.05 to each instead of the sum of $1507.99 to each, as set forth in said executrix's account."

The court also allowed the executrix $300 and her attorney $500 additional fees for extraordinary services rendered the estate. The court also allowed the $75 paid to the accountant for assisting the executrix in the preparation of the federal and state income tax returns for 1936, but disallowed and reduced the sum of $150 to $60 which the court found to be "reasonable compensation * * * for services rendered in the preparation of federal and state income tax returns". In this regard, the court expressly found that the executrix had exceeded her authority in employing said accountant to assist her in the preparation of her final account.

The first question presented is whether the lower court was in error, in deducting the amount of the encumbrance due on the

apartment house, which the purchaser agreed and assumed to pay, and thereafter fixing the statutory fee on the balance, to-wit, $34,302.42, instead of $67,799.42.

Section 901 of the Probate Code establishes the right and fixes the measure of the commission of executors and administrators. Said section reads as follows: "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent. * * *" Section 910 of the Probate Code establishes the fees of attorneys upon the same basis as those of executors and administrators.

[1] It is apparent that "the amount of the estate accounted for" is the base for reckoning commissions, and that once this figure is established the matter of determining the correct statutory fees is merely a matter of computation. 11 B Cal.Jur., p. 461, sec. 1025; Estate of Straus, 144 Cal. 553, 556, 77 P. 1122. The cases in this state which have analyzed and discussed the meaning of the phrase, "the amount of the estate accounted for", in arriving at a solution of whether or not the correct base had been used in computing statutory fees of an executor or administrator are limited in number, and the fact that the cases in this jurisdiction relied upon by the appellant are practically identical with the cases relied upon by the respondent indicates that the opinions therein are susceptible of different and contrary interpretations.

[2] Appellant, who claims to have "accounted for" the total sale value of the apartment house and furnishings, including the amount of the encumbrance thereon, insists that an executor is entitled to commissions upon the entire value of the property "which he has taken into his possession". She argues that because she had taken into her possession the physical property consisting of the apartment house and furnishings, she is entitled to commissions based upon the total sale price of said apartment house and furnishings. There can be no doubt that the executrix actually took possession of the apartment house and furnishings. Also there can be no doubt that the taking possession of property belonging to the decedent is one of the tests of whether or not an executor is entitled to the allowance or commissions based upon the inclusion of said property in his accounts. As early as 1866, in the Estate of Isaacs, 30 Cal. 105, 106, this court reversed a judgment which disallowed to the executors commissions upon the five thousand dollars set apart to the widow in lieu of a homestead, saying, "The estate of the deceased, from which the five thousand dollars set apart to the widow in lieu of the homestead was derived, came to the possession of the executors, and they were made responsible for the whole estate, including the sum so set apart, and were entitled to their commissions thereon in their settlement." This rule has been consistently followed. Estate of Simmons, 43 Cal. 543; In re Ricaud, 70 Cal. 69, 11 P. 471; Estate of Pease, 149 Cal. 167, 85 P. 149; Estate of Boggs, 33 Cal.App.2d 30, 90 P.2d 814.

[3] It should be noted, however, that the taking possession of property claimed as part of the estate of decedent is not the sole test, or the only essential factor to be taken into consideration in determining "the amount of the estate accounted for" by the executor or administrator. An analysis of the decisions involving this particular question indicates that the crucial test is not so much the actual taking possession of the property, but the test is whether or not the executor or administrator is responsible for, or chargeable with, the property upon which commissions are sought. In fact, the very cases which hold that a method for determining whether or not an executor is entitled to commissions upon certain property is to determine whether or not such property has been taken into possession by the executor, base their conclusion upon the reasoning that an executor or administrator is responsible for and chargeable with the property which he has taken into his possession. Thus in Estate of Isaacs, supra, the court allowed the commission to the executors upon the ground that the $5,000 given the widow in lieu of a homestead had come into the possession of the executors, "and they were made responsible" for the whole estate, including the sum so set apart, and in Estate of Ricaud, supra, where property had been included in the

inventory, possession of which had been taken by the executors, but which during the course of administration had been turned in compliance with a judgment secured against said executors in an action for possession of the property originally instituted against the decedent, the court refused to allow commissions computed upon the value of said real property, holding the executors were not entitled to such commissions for the reason that the value of the land "did not form any part of the value of the estate in the possession of the executors for which they were chargeable". [70 Cal. 69, 11 P. 472.] In In re Delaney, 110 Cal. 563, 42 P. 981, the court held that the reasoning in the Ricaud case, supra, was applicable to that case, and refused to allow commissions upon property taken into possession by an executor, but lost in a lawsuit during the course of administration. It is also undoubtedly the basis of the reasoning in the subsequent decisions in this state. Estate of Simmons, 43 Cal. 543; Estate of Fernandez, 119 Cal. 579, 51 P. 851; Estate of Carver, 123 Cal. 102, 55 P. 770; Estate of Pease, 149 Cal. 167, 169, 85 P. 149; Estate of O'Connor, 200 Cal. 646, 254 P. 269; Estate of Fritz, 140 Cal. App. 487, 35 P.2d 643; Estate of Boggs, 33 Cal.App.2d 30, 90 P.2d 814. In other words, the principle which underlies all of these cases dealing with the question of the "amount of the estate accounted for" by an executor or administrator, is the premise that the measure of the executor's responsibility is the measure of his compensation.

[4] It was in accordance with this principle that the court in Estate of Carver, 123 Cal. 102, 55 P. 770, allowed commissions to the administratrix based upon the total value of the estate of the decedent rather than deducting therefrom the value of the land which had been turned over to the mortgagee upon a compromise of a foreclosure suit. The debt existing therein was the debt of the decedent for which he and his estate were liable, and the turning over of the property to the mortgagee in settlement of the debt was not a mere bookkeeping transaction, but an "accounting for" that portion of the estate. Likewise, in Estate of Pease, supra, the debt was a debt of the decedent, and a claim therefor had been presented to the estate. The court in allowing to the executor a commission based upon the total sale price of the property held that the payment of the mortgage was done by the real estate broker as an agent of the executor, and based its holdings upon the fact that "the executor is bound to account to the court for the entire proceeds of sales made under its orders".

The trial court in the instant case placed its reason for deducting the encumbrance from the total sale price of the apartment prior to computing the statutory fees, squarely upon the fact that the indebtedness of the trust deed was not that of the decedent and no claim had been presented against the estate. In other words, the executrix was not responsible for, or chargeable with, the entire purchase price but only the excess of the total sale price over the encumbrance. The court in Estate of Pease, supra, makes this same distinction, for it says [149 Cal. 167, 85 P. 151]: "The general rule appears to be that where property subject to an incumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the incumbrance. 2 Woerner's Am.Law of Adm. (2d Ed.) [p.] 1166; Buerhaus v. De Saussure, 41 S.C. 457, 19 S.E. 926, 20 S.E. 64; Baucus v. Stover, 24 Hun. (N.Y.) 109; cf. Hitchcock v. Mosher, 106 Mo. 578, 17 S.W. 638. An examination of these cases indicates that what was sold was merely the equity of redemption, and it may well be held that where property is sold subject to an incumbrance which still remains, the commissions should be calculated only on the value of the interest sold. Here, however, the mortgage had been presented as a valid claim against the estate."

In Estate of Boggs, 33 Cal.App.2d 30, 90 P.2d 814, the court held that the executrix was only chargeable in her account with that portion of the estate of decedent which had actually come into her possession, and was not entitled to commissions based upon the property which had not come into her possession but which was held by a bank as security for an indebtedness which was larger than the actual value of the property held as security. It is apparent that since the facts in that case are different from those in the instant case in that the property there involved was not taken into the possession of the executrix, the decision therein is not particularly helpful in the instant case.

[5] We are satisfied that the determinative factor in the instant case is whether or not the executrix herein was chargeable

with, or responsible for, the total value of the apartment house and furnishings, as evidenced by the sale price of $47,500, or only for the actual sum received by her, that is to say, $14,003. We think there is no doubt that she was only chargeable with the $14,003, and that, therefore, the probate court did not err in refusing to allow her commissions based upon the total sale price of the property.

[6] In this connection it may be noted that both the executrix and the attorney herein received additional fees for extraordinary services in connection with the management and sale of the apartment house and the administration of the estate. This power of the court to grant additional fees for extraordinary services is one which may be used to equalize any injustice which may result when the estate upon which the commissions are allowed is small, and the services involved are extra onerous.

[7, 8] Appellant's second contention that the court erred in reducing the fee allowed the accountant for services to her in preparing her final account cannot be sustained in the absence of a showing of an abuse of discretion. The matter of payment to third persons for services rendered an executor rests in the sound discretion of the court. Estate of Boggs, supra.

The judgment is affirmed.

We concur: WASTE, C. J.; HOUSER, J.; SHENK, J.; CARTER, J.; EDMONDS, J.; GIBSON, J.




38 Cal.App.2d 37

**STUDEBAKER et ux. v. BOWER et al.**

Civ. 2478.

District Court of Appeal, Fourth District, California.

March 15, 1940.

**Appeal and error ⇐787**

Where notice of appeal was filed on December 27, 1937, no notice to prepare a transcript, no reporter's or clerk's transcript, and no bill of exceptions was filed, no extension of time for preparation of a record was granted, and appellants made no appearance in the reviewing court in response to notice of motion to dismiss appeal which was served on them, statutory time within which a record on appeal may be prepared and filed having expired, motion to dismiss appeal was required to be granted.

Appeal from Superior Court, Orange County.

Action by Charles Studebaker and Bessie Studebaker, his wife, against John Bower and others. From the judgment, plaintiffs appeal, and defendants move to dismiss the appeal.

Motion granted and appeal dismissed.

No appearance for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, and Sigurd E. Murphy, of Hollywood, for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss this appeal on the ground that the appellants have failed to file a request for the preparation of a transcript, that no such transcript has ever been prepared or settled, that no bill of exceptions has been prepared or settled, and that the time for taking these steps, or either of them, has expired.

It appears from the certificate of the clerk of the trial court that notice of appeal was filed on December 27, 1937, that no notice to prepare a transcript has ever been filed, that no reporter's transcript or clerk's transcript has been filed, and that no bill of exceptions has been filed. It further appears that no extension of time for the preparation of a record has been granted and the appellants made no appearance in this court in response to the notice of this motion which was served upon them. The statutory time within which a record on appeal may be prepared and filed having expired, the motion must be granted. Stewart v. Marple, 126 Cal.App. 771, 15 P.2d 202.

The motion is granted and the appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.

37 Cal.App.2d 621

**MORRIS PLAN CO. OF SAN FRANCISCO v. JOHNSON, State Treasurer.**

**Civ. 11315.**

District Court of Appeal, First District, Division 2, California.

March 5, 1940.

Rehearing Denied April 4, 1940.

Hearing Denied May 2, 1940.

**1. Taxation ⇐12**

A Morris Plan Company, incorporated under the industrial loan law, was in "substantial competition with national banks," within meaning of federal statute providing that a state may not tax national bank shares more than capital in competition with national banks, where one national bank, which was located in same city, and which had capital and surplus in excess of $110,000,000, had $39,000,000 outstanding in personal loans, installment loans, and discounting contracts for payment of money, another national bank in same city had about $900,000 outstanding in such loans, and other national banks transacting business in city had made similar contracts. Gen.Laws 1937, Act 3603, § 9; 12 U.S.C.A. § 548.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Competition with National Banks".

**2. Taxation ⇐12**

"Competition" within federal statute providing that national bank shares shall not be taxed at greater rate than moneyed capital coming into "competition" with the business of national banks, does not mean that there should be a competition as to all phases of the business of national banks but implies the performance of some banking functions performed by a national bank, and statute is violated whenever capital, substantial in amount when compared with the capitalization of national banks, is employed, either in a business or by private investors, in the same sort of transactions as those in which national banks engage, and in the same locality in which they do business. 12 U.S.C.A. § 548.

See Words and Phrases, Permanent Edition, for all other definitions of "Competition".

**3. Taxation ⇐12**

The words "financial corporation" as used in the federal statute forbidding a state to impose a higher tax on national banks than other "financial corporations," and adopted into the state franchise tax act, designate and include moneyed corporations performing some of the functions of a national bank, the quoted term meaning a corporation dealing in money as distinguished from other commodities. St.1935, p. 1248, § 5; 12 U.S.C.A. § 548.

See Words and Phrases, Permanent Edition, for all other definitions of "Financial Corporation".

**4. Taxation ⇐12**

A Morris Plan Company, which was incorporated under the industrial loan law and which was in substantial competition with national banks in the locality, was a "financial corporation" within the meaning of the federal statute forbidding a state from imposing a higher tax on national banks than on other "financial corporations." Gen.Laws 1937, Act 3603, § 9; St.1935, p. 1246, § 4, subd. 1; p. 1247, § 4a; p. 1248, § 5; 12 U.S.C.A. § 548.

**5. Statutes ⇐219**

The fact that state's fiscal officers had previously construed the bank and corporations franchise tax act as inapplicable to a Morris Plan Company, incorporated under the industrial loan law, would not bind the state where the act was not ambiguous, and there was no showing that the fiscal officers knew facts showing that the bank and corporations franchise tax act was applicable to the Morris Plan Company. St.1935, p. 1246, § 4, subd. 1; p. 1247, § 4a; Gen.Laws 1937, Act 3603, § 9.

**6. States ⇐66**
**Statutes ⇐219**

If a statute's meaning is doubtful, then the construction put on it in actual administration by officers intrusted with its administration should be given great weight by the courts in determining its true meaning, but if its meaning is not doubtful, and the regulations are in conflict with the meaning, they are void.

**7. Taxation ⇐115**

The fact that Morris Plan Company, incorporated under the industrial loan law, was at one time subject under that law only to taxation as a general corporation, did not prevent the Legislature from subsequently changing the rule and reclassifying corporations for purposes of taxation. Gen.Laws 1937, Act 3603.

**8. Pawnbrokers and money lenders ⇐2**

The only effect of the provisions of the bank and corporations franchise tax act tax-

**ing financial corporations was to reclassify corporations for purposes of taxation, and it did not by implication repeal any portion of the industrial loan law. St.1935, p. 1246, § 4; p. 1247, § 4a; Gen.Laws 1937, Act 3603.**

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by the Morris Plan Company of San Francisco against Charles G. Johnson, as Treasurer of the State of California, to recover a franchise tax claimed to have been illegally collected from the plaintiff. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Hearing denied; CARTER, J., dissenting.

Earl Warren, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for appellant.

Samuel S. Stevens, Richard E. Guggenhime, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff was awarded judgment against the defendant in an action brought to recover a franchise tax for the year ending December 31, 1936, claimed to have been illegally collected from it. The defendant has appealed from the judgment. The plaintiff was incorporated under the Industrial Loan Company Law (Deering's General Laws [1937] Act No. 3603), hereinafter referred to as Act No. 3603. The controversy involves the proper interpretation of the provisions of Chapter 13 of the Statutes of 1929 and the acts amendatory thereof, hereinafter referred to as the Franchise Tax Act. The defendant claims the plaintiff was properly taxed as a "financial corporation" as provided in the first paragraph of section 4 of said statute at the rate provided in section 4a thereof (as amended by St. 1935, pp. 1246, 1247). The plaintiff disputes that claim and asserts it was liable for taxes as a general business corporation as provided in section 9 of Act No. 3603, that it has paid its taxes, and that it is not liable as a "financial corporation". So contending it pleaded the facts. Issue was joined and a trial was had. Witnesses were called by each party and they were examined and cross-examined. Later the trial court made and filed findings of fact and conclusions of law in which it was found that the plaintiff was not a "financial corporation" and that, in 1936, it was not in "substantial competition" with national banks. The defendant claims neither finding was sustained by the evidence.

As noted above the case presents questions of statutory construction. Those questions arise out of a history of legislation in this state covering many years. That history is recited in Pacific Co., Ltd., v. Johnson, 212 Cal. 148, 298 P. 489, to which reference is specially made.

[1, 2] As stated above the defendant claims the evidence is insufficient to support the findings that the plaintiff was not a "financial corporation" and that it was not "in substantial competition with national or state banks" in the year 1936. We will take up a consideration of the latter finding first. The uncontradicted evidence before the trial court showed that in the year 1936 the Bank of America, and the Pacific National Bank, were national banks transacting business in San Francisco and in other parts of the state. Each was engaged in loaning money. The combined capital and surplus of the Bank of America was in excess of $110,000,000. The plaintiff's combined capital and surplus was in excess of $625,000. Such loans included personal loans, instalment loans, and discounting contracts for the payment of money. At times each advertised for such business. Some of those loans included the discount or purchase of conditional sales contracts of furniture, refrigerators, burners, gas burners, gas furnaces, washing machines, radios, automobiles, and many other articles. Other national banks transacted business in San Francisco and made similar contracts. At the time of the trial the Bank of America had outstanding such loans in the sum of $39,000,000. The Pacific National had about $900,000. The plaintiff was, in the same locality, making similar loans and had outstanding about $4,500,000. The foregoing facts show, as a matter of law, that the plaintiff was in substantial competition with the loan and investment features of the business of national banks. Title Guarantee Loan & Trust Co. v. State, 228 Ala. 636, 155 So. 305, 308; State v. National Credit Co., 236 Ala. 224, 181 So. 769, 771. Competition within the meaning of section 5219, Rev. Stats.U.S., 12 U.S.C.A. § 548, does not mean there should be a competition as to "'all phases of the business of national banks. * * * section 5219 is violated

wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business. * * * It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount.' * * * 'even though the competition be with some, but not all, phases of the business of national banks, or it may arise from the employment of capital invested by institutions or individuals in particular operations or investments like those of national banks.' Minnesota v. First National Bank, 273 U.S. 561, 47 S.Ct. 468, 470, 71 L.Ed. 774." Ward v. First Nat. Bank of Hartford, 225 Ala. 10, 142 So. 93, 95, 96. It is clear, therefore, that plaintiff was doing business in competition with the national banks.

[3, 4] Taking up the attack on the finding that the plaintiff is not a "financial corporation", the briefs of counsel revolve around the fact that the Franchise Tax Act does not define the term. That contention is not helpful. The pleadings admit the plaintiff is a corporation. Section 5 of the Franchise Tax Act (as amended by St. 1935, p. 1248), provides: "The term 'corporation,' as herein used, shall include every corporation, other than a bank or banking association * * *." The word "financial" when used with reference to corporations, refers to corporations dealing in money as distinguished from other commodities. Webster's New International Dictionary. Furthermore, to compete with a national bank implies the performance of some banking functions performed by a national bank. It follows that the words "financial corporation", as used in section 5219, Rev.Stats., and adopted into our Franchise Tax Act, designate and include moneyed corporations performing some of the functions of a national bank. The plaintiff was certainly an institution of that class.

[5, 6] The plaintiff claims the Bank and Corporations Franchise Tax Act is ambiguous, that the fiscal officers have heretofore construed it in favor of the plaintiff, and that the defendant is bound by that construction. We think that contention is not sound. In the first place said statute is not ambiguous and for that reason the contention may not be sustained. Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86. In the second place the record does not disclose any facts showing that prior to the year 1936 any officer of the state knew the facts showing the plaintiff was so conducting its business as to compete with national banks. However, in its brief, the plaintiff sets forth two letters. One contains nothing showing competition with national banks through acts of an Industrial Loan Corporation. It was written about six months before this action was commenced. The other purports to be portions of Opinion No. 8599 rendered by the attorney general June 1, 1933. The record discloses, however, that said opinion was recalled. In Hodge v. McCall, 185 Cal. 330, at page 334, 197 P. 86, at page 88, Mr. Justice Olney, speaking for the court, said: "If its meaning be doubtful, then the construction put upon it in actual administration by the officers intrusted with that administration should be given great weight by the courts in determining its true meaning. But if its meaning be not doubtful, and the regulations are in conflict with that meaning, they are simply void. If this be not true, it is within the power of the department officials to override and annul an act of Congress." For these reasons we think the rule of departmental construction is not applicable.

In Louisiana, notwithstanding they have the right to do so, national banks do not make the class of personal loans made by this plaintiff. On the other hand they make their loans to the vendors and require the latter to make the collections on, and handle their own conditional sales contracts and similar instruments. In the consolidated cases entitled First National Bank v. Louisiana Tax Commission, 289 U.S. 60, 53 S.Ct. 511, 77 L.Ed. 1030, 87 A.L.R. 840, it was contended that certain institutions were transacting business in competition with the national banks and that said banks were being discriminated against. The cases were tried in the state courts. The Supreme Court of Louisiana made findings to the effect that the competition complained of had not occurred, 175 La. 119, 143 So. 23. Holding it was not warranted in disturbing the findings of the state court, the Supreme Court of the United States, through Mr. Justice Brandeis, affirmed the judgment of the Supreme Court of Louisiana. There is nothing in that case in conflict with the instant case.

[7, 8] The plaintiff claims that under section 9 of the Industrial Loan Law it was subject to taxation solely as a general corporation. That was so in 1917 when the Industrial Loan Act was enacted. However, a subsequent legislature had the power to change the rule and reclassify corporations for purposes of taxation. That, and that only, is the effect of the first paragraph of section 4 and section 4a of the Franchise Tax Act. That act shows a departure from section 9 of the Industrial Loan Act, but no question of repeal by implication is involved. The real principle involved, as we see it, is a substitution by revision. In 1929 there were numerous sections in the Political Code applicable to the taxation of the intangibles of banks and other corporations. When the Bank and Corporation Franchise Tax Act was passed, on its face it purported to revise that entire subject. It purports to cover every phase of the levy, assessment, and collection of said taxes. In State v. Conkling, 19 Cal. 501, at page 512, the court said: "We do not consider that the rule applicable here is, that this is a repeal by implication as that rule is usually applied; but the princip[le] is, that when the Legislature makes a revision of particular statutes, and frames a general statute upon the subject matter, and from the frame-work of the act it is apparent that the Legislature designed a complete scheme for this matter, this is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored. It was upon this principle that the case of Sacramento v. Bird (15 Cal. 294) was decided. * * * Mr. Justice Cope, delivering the opinion of the Court, used this language, which we think correctly gives the rule: 'It is impossible to avoid the conclusion that this salary is in lieu of the per cent. previously allowed, and was not intended as additional compensation to the Treasurer. It is true, the law does not favor the repeal of statutes by implication, but it is not true that a statute, without negative words, will in no case repeal the provisions of a former one, unless the two acts are directly repugnant and inconsistent. Every statute must be considered according to what appears to have been the intention of the Legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the original act. (Sedg. on Const. and Stat.Law, 124.) * * *' This doctrine of construction not only commends itself by its plain sense and justice, but is sanctioned by numerous authorities. (Sedg. on Const. and Stat.Law, 124 * * *.) See also Pierpont v. Crouch (10 Cal. [315], 316) in which case the authorities are collected in the opinion of the present Chief Justice."

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.




38 Cal.App.2d 83

## PEOPLE v. GAYTAN.

Cr. 396.

District Court of Appeal, Fourth District. California.

March 20, 1940.

**1. Criminal law ⇐829(6)**

Where an instruction as to whether accused was so intoxicated as to be incapable of forming intent essential to constitute crime of burglary was given at accused's request, refusal of another instruction on the same subject was not error. Pen.Code, § 22.

**2. Criminal law ⇐774**

In burglary prosecution, instruction that evidence of intoxication may be considered by jury for the purpose of determining the degree of the crime and in determining the purpose, motive or intent with which accused committed the act, was not objectionable as limiting the jury to consideration of such evidence only as it affected the degree of the crime since instruction specifically authorized consideration of such evidence in determining the intent with which the act was committed. Pen.Code, § 22.

**3. Criminal law ⇐829(3)**

Where court gave instruction that if accused entered a room in the cafe building with the intent to commit the crime of theft, accused was guilty of burglary, refusal of requested instruction on same sub-

ject and which might have confused the jury as to when the intent to steal must have existed in the mind of the accused, whether at the time he entered the cafe or at the time he entered the room was not error.

**4. Criminal law ⇐55**

The preponderance of the evidence was not the test as to whether accused's state of voluntary intoxication was such as to render him incapable of forming specific intent to commit larceny at the time he entered storage room of cafe from which cigarettes were taken. Pen.Code, § 22.

**5. Criminal law ⇐739(1)**

Whether accused's state of voluntary intoxication was such as to render him incapable of forming specific intent to commit larceny at the time he entered storage room of cafe from which cigarettes were taken was for the jury. Pen.Code, § 22.

**6. Criminal law ⇐1159(5)**

Jury's determination that accused was not in such state of voluntary intoxication as to render him incapable of forming specific intent to commit larceny at time he entered storage room from which cigarettes were taken was binding on court of appeal. Pen.Code, § 22.

**7. Burglary ⇐41(1)**

Evidence sustained conviction of burglary in the second degree.

---

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Pete Gaytan was convicted of burglary in the second degree and from the judgment of conviction and an order denying a motion for new trial, he appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

Earl Warren, Atty. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was convicted of burglary in the second degree and appealed from the judgment and order denying his motion for a new trial. He contends that the trial court erred in failing to give his instructions on intoxication and intent, and that the verdict is contrary to law.

On the night of November 6, 1939, appellant and a young lady companion entered a cafe at 354–356 South Seventh street in the city of Colton and sat in a booth where appellant dined and drank beer, remaining in the cafe until 1:15 o'clock the following morning. A bar adjoined the cafe, separated by a partition, and access thereto from the cafe was through a dividing door. In the rear of the building were rest rooms for men and women; also a room which had formerly been used as a dance hall but in which Mr. Noriega, the owner, maintained a cot. Back of the ladies' rest room there was a storage room where Mr. Noriega kept cartons of cigarettes, a phonograph and other paraphernalia. At about 9 o'clock on that night Mr. Noriega reclined on the cot but could not sleep, and while lying there saw appellant walk into the storage room and throw cartons of cigarettes out of the room through an opening between the top of the outside wall and the roof. Appellant, after throwing the cartons of cigarettes through this opening, left the storage room but returned in about 15 minutes and threw more cartons of cigarettes through the opening at the top of the wall. Mr. Noriega then arose from the cot and went around to the back of the building, looked over a fence, and saw a boy picking up the cartons of cigarettes. Mr. Noriega went around to a gate and through an alley, at which time he saw another boy who was watching and who started to run. Mr. Noriega gave chase but the boy was too fast and got away. He recognized the boys and identified them in court. One was Larry Garcia and the other was Tony Guitron. After giving up the chase, Mr. Noriega returned to the place where the cartons of cigarettes had been thrown from the storage room and recovered three or four of them from the ground. He entered the dining room but appellant was not there. Mr. Noriega then talked to a police officer about the affair. During the time appellant was sitting in the booth with his lady companion, Larry Garcia and Tony Guitron entered the cafe and held a conversation with appellant for about five minutes and then the three of them walked toward the men's rest room, at which time appellant told Larry Garcia there were some cigarettes outside of the storage room and to get them and put them in the car. Upon returning to the front part of the premises Garcia and Guitron went outside and appellant went back to the booth. Later, Larry Garcia reentered the

cafe and he and appellant again went back toward the men's rest room. In a few minutes they returned, Garcia going outside and appellant going to the booth. On the second meeting of the two, appellant gave the keys to his car, which was parked in front of the cafe, to Garcia. Garcia and Guitron moved the car to N street, then went and picked up the cartons of cigarettes on the outside of the building and put them in the car. They drove around and met appellant and his lady companion at N and Seventh streets, which was the same place they had previously parked the car. Appellant and the girl got into the car and Garcia and Guitron went for more cartons of cigarettes after appellant had talked to Garcia. Guitron returned to the car with the cigarettes and told appellant that Noriega was chasing Garcia. Guitron got in the car with appellant and his girl friend and they drove down the highway, stopping the car en route while Guitron hid the cigarettes. They returned to Seventh and F streets where Guitron left them and went home. Garcia, after eluding Mr. Noriega, went home and was later aroused from bed by two police officers. At 1:30 o'clock in the afternoon of November 7th, appellant telephoned and asked Mr. Noriega's wife what had happened "last night", and she asked him, "Well, what were you doing in the back room?" He said, "Well, I am willing to pay for the cigarettes that I took." She told him that she did not have anything to do with it and for him to come and talk to Milton. Appellant testified that he was "drunk" on this occasion, denied the commission of the act charged, but stated that he remembered all the conversation that took place. Other witnesses testified that he "didn't look drunk" and that he did not appear to be intoxicated.

Stripped of unnecessary minutiae, the facts related constitute the evidence presented.

Appellant requested the following instruction which was refused, and he contends that its refusal warrants the granting of a new trial: "* * * that voluntary intoxication is not an excuse for a criminal act, but in any case in which criminal responsibility depends upon premeditation, or the formation of a specific intent, it is proper for the jury to consider whether the accused was so intoxicated that he was incapable of forming an intent and, therefore, whether he could have been guilty of the crime charged. The intent with which a building is entered being a necessary element of the crime of burglary, it is proper for the jury to take into consideration the fact that the accused was intoxicated at the time in determining the intent with which he committed the act; but such fact is to be considered by the jury for the sole purpose of determining whether the person accused was intoxicated to such an extent as to render him incapable of forming the specific criminal intent essential to constitute the crime."

[1] Appellant requested another instruction in the language of section 22 of the Penal Code on the same subject which was given. Where a trial judge properly covers the law on a subject in the instructions given to a jury, there is no error in refusing additional instructions requested by a defendant on the same subject. People v. Morales, 26 Cal.App.2d 442, 444, 79 P.2d 771. In addition to the above-mentioned instruction the court gave another instruction on this subject reading in part as follows: "* * * Evidence of such intoxication may be considered by the jury for the purpose of determining the degree of the crime, and in determining the purpose, motive or intent with which he committed the act, * * *."

[2] Appellant contends that this last-mentioned instruction should not have been given because of the criticism enunciated in People v. Phelan, 93 Cal. 111, 113, 28 P. 855. The objectionable portion of the instruction given in that case was "evidence of drunkenness can only be considered by the jury for the purpose of determining the *degree of the crime,* * * *." (Italics ours.) The court said that the instruction withdrew from the consideration of the jury evidence which the code says a jury may consider in determining the intent with which an act is committed. This criticism is not applicable to the instruction given in the instant case because it does not state that evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime, but states that evidence of such intoxication may be considered by the jury for the purpose of determining the degree of the crime and in determining the purpose, motive or intent with which the act was committed.

Appellant further contends that the trial court erred in refusing to give another instruction requested by him to this effect: "* * * If a thief, therefore, should en-

ter a store to buy food and clothes, and after entering changes his mind and concludes to steal and not to purchase his supplies, the offense would be mere larceny; but if it be proven that he entered with intent to steal, the law will not in the face of such proof, shield him from punishment as a burglar on the assumption that he has the consent and invitation of the proprietor to so enter."

[3] Although the information describes the premises as a room in the cafe building, yet this instruction, if given, might have confused the jury relative to when the intent to steal the cartons of cigarettes must have existed in the mind of appellant, whether at the time he entered the cafe or at the time he entered the room. The trial court, after defining burglary in the language of the statute, gave to the jury the following instruction: "In this connection you are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant * * * did * * * feloniously enter a room in the cafe building of Milton Noriega located at 356 South 7th Street in the City of Colton, California, with intent then and there to commit the crime of theft * * * then you must find the defendant * * * guilty * * *." This subject was fully and properly covered by the instruction that was given.

[4-6] Appellant states that the verdict of the jury is contrary to law in this, that the "preponderance" of the testimony shows that he was so intoxicated at the time of his arrival at and departure from the premises alleged to have been burglarized as to have been incapable of forming any intent or motive for taking anything from said building or any portion thereof. In criminal cases the preponderance of the evidence is not the test. People v. Lamb, 67 Cal.App. 263, 227 P. 969. At most, the evidence presents merely a conflict as to whether appellant was intoxicated. Therefore, under the evidence submitted, it was for the jury to determine whether appellant's state of voluntary intoxication was such as to render him incapable of forming the specific intent to commit larceny at the time he entered the storage room. The jury having determined the matter adversely to appellant, its finding is binding on the appellate court.

[7] The evidence being sufficient to support the verdict and no error appearing either in the instructions given or in the refusal of the trial court to give the instructions requested by appellant, the appeal from the judgment and order denying the new trial is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




**ELLIOTT v. McCOMBS et al. ***

Civ. 2520.

District Court of Appeal, Fourth District, California.

March 18, 1940.

Rehearing Denied April 17, 1940.

Hearing Granted May 16, 1940.

1. Easements ⇐14(3)

Reservations of portions of strip of land for road purposes in deeds, not stating that such reservations were for benefit of lands adjoining those conveyed, were for purely personal benefit of grantor and not for benefit of owners of adjoining parcels conveyed without reservations.

2. Easements ⇐12(1), 14(2)

The intention of parties to deeds respecting right of way over lands conveyed for benefit of adjoining parcels should be determined by fair interpretation of grant or reservation creating easement.

3. Easements ⇐12(1), 14(2)

Generally, grantor's intention respecting grant or reservation of easement of right of way over land conveyed for benefit of adjoining parcels should be determined from language of deed, interpreted in light of attending circumstances, not by conjecturing intent from circumstances and construing language of deed accordingly.

4. Easements ⇐42

The extent of burden of easements reserved in deeds for road over lands conveyed from adjoining lands is determined by individual grants themselves, not all of them together. Civ.Code, § 806.

5. Easements ⇐14(3)

Whether grantor intended to carve road for grantees' mutual benefit out of grantor's

* For subsequent opinion, see 109 P.2d 329.

lands adjoining those conveyed must be determined as of time of conveyance without considering grantor's subsequent deeds of adjoining lands.

6. Easements ⇐14(3)

The joint intent of grantor and grantees of lands, not grantor's intention alone, controls on question of intent to carve road out of adjoining lands, subsequently conveyed to others, for grantees' mutual benefit.

7. Easements ⇐17(1)

A grantee, taking land conveyed without notice of grantor's plan to carve road out of adjoining lands, subsequently conveyed to others, for grantees' mutual benefit, acquires his interest free of burdens imposed thereby.

8. Easements ⇐17(1)

While easement may be created by estoppel and conveyance of lots in tract of land under plan, known to grantees, to set apart road for benefit of such lots, passes reciprocal easement in road with each lot conveyed, grantees are not bound thereby, in absence of notice to them of such plan or existence of road at time of conveyance.

9. Easements ⇐3(2)
Judgment ⇐682(1)

A road easement, reserved by corporation's deed, not declaring that easement was for benefit of any land adjoining that conveyed, did not attach appurtenance to adjoining parcel, previously conveyed by grantor to third party without reservation, but was "easement in gross" and personal to grantor, so that judgment quieting grantees' title to land conveyed was conclusive against grantor and its successors in interest. Code Civ.Proc. §§ 751, 1908, 1962.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement in Gross".

---

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action in equity by Besse C. Elliott against Virgil McCombs and another to enjoin interference with plaintiff's use of, and quiet title to, a right of way and easement for road purposes over defendants' land. Judgment for plaintiff, and defendants appeal.

Reversed.

Wm. H. B. Haymond, Herbert L. Iasigi, and Judd Downing, by Wm. H. B. Haymond, all of Los Angeles (Elmer Patrick Friel, of Los Angeles, of counsel), for appellants.

John J. Craig, of Los Angeles, for respondent.

GRIFFIN, Justice.

By this action in equity plaintiff Besse C. Elliott, respondent herein, asks injunctive relief and seeks to quiet title to a right of way and easement for road purposes over the properties of Virgil McCombs and Eva F. McCombs, defendants and appellants. The tract of land involved in this litigation was acquired by the San Fernando Mission Land Company, hereinafter referred to as the "Land Company" on January 18, 1905, and is described as tracts 9, 10, 15 and 16 of subdivision No. 1 of Porter Land and Water Company, as per map recorded in book 31, page 3, miscellaneous records of Los Angeles county. Said map was recorded in 1888 and showed, included with the subdivision of adjoining lands, the subdivision into quarters of the southwest quarter of section 18, township 2 north, range 15 west, S.B.B. & M., in Rancho Ex Mission de San Fernando. These quarters are designated on this map by the above tract or lot numbers as: Tract No. 9 being the northwest quarter, tract No. 10 being the northeast quarter, tract No. 15 being the southeast quarter, and tract No. 16 being the southwest quarter, which quarters will hereinafter be referred to by their respective tract numbers. This map also showed roads bounding the four sides of said quarter section. These roads came to be known as Devonshire street on the north, Hayvenhurst avenue on the east, Lassen street on the south and Balboa avenue on the west.

Defendant Virgil McCombs' property, over which plaintiff claims a right of way, comprises the west half of tract 16 and the southwest quarter of tract 9, the westerly boundary thereof fronting on the aforementioned road, Balboa avenue. Plaintiff's property comprises the southeast quarter of tract 9, adjoining the easterly boundary of defendant's southwest quarter of tract 9. The right of way in question is claimed over a strip of land, 60 feet in width, running east and west across defendant Virgil McCombs' land. This strip claimed as a right of way comprises the north 30 feet

of the west half of tract 16 and the south 30 feet of the southwest quarter of tract 9.

After acquiring title in 1905 from the subdivider, the Land Company conveyed in parcels all that land in said quarter section bounded by the line of abutment between the north and south halves thereof. This line of abutment is the center line of the right of way in question. In certain deeds of parcels bounded on the south by said line the Land Company set forth reservations of the southerly 30 feet thereof for road purposes, while in other deeds of adjoining parcels no such reservations were made. Certain deeds of parcels bounded on the north by said line contained reservations of the northerly 30 feet thereof for road purposes, while deeds of adjoining parcels neglected to provide for like reservations. Plaintiff contends that, by virtue of these reservations, the Land Company intended to and did set apart for the benefit of adjoining landowners a strip of land 60 feet in width lying between the north and south halves of said quarter section and running from the east to the west boundary thereof.

After the execution and payment of a contract of sale dated in 1919 (the terms of which are not disclosed as to any reservations therein), by deed dated June 20, 1922, the Land Company conveyed to one Rice, defendant Virgil McCombs' immediate grantor, the west half of tract 16 and the southwest quarter of tract 9. This deed conveyed "the west half of the southwest quarter, except the north 30 feet thereof reserved for road purposes, and the southwest quarter of the northwest quarter, except the south 30 feet thereof reserved for road purposes". The reservations embodied in this language of the description in said deed to Rice constitute the sixty-foot strip in controversy and over which plaintiff claims to be entitled to a right of way and easement. On July 14, 1927, Rice commenced an action against the Land Company in the superior court of Los Angeles county to quiet title to the west half of tract 16 and the southwest quarter of tract 9, being the land now owned by defendant Virgil McCombs, and mentioned herein as having been conveyed to Rice by the Land Company. Notice of the pendency of the action was duly given in writing and recorded in the office of the county recorder of Los Angeles county. No contest having been made by the Land Company, and its default in said action having been duly entered, Rice was, on May 22, 1930, adjudged the owner and in possession, and the decree quieting his title to said property, including the claimed right of way, was duly entered on May 23, 1930. At the time this quiet title action was filed the Land Company had conveyed all of its interest in and to the said southwest quarter of section 18, except the interests reserved and retained by it through reservations for road purposes in some but not all of its deeds. On May 22, 1930, the date of the decree in said quiet title action, there was recorded a deed dated May 3, 1930, from Rice and wife to defendant Virgil McCombs, conveying the west half of tract 16 and the southwest quarter of tract 9, being the land plaintiff seeks to burden with an easement. This deed from Rice to defendant did not contain any reservations of, or reference to, an easement or right of way. Thus defendant acquired his interest in the above-described property, which he has held ever since.

Prior to the conveyance from the Land Company to Rice, and by deed dated February 23, 1922, the Land Company conveyed the southeast quarter of tract 9, plaintiff's property, and the northwest quarter of tract 15 to Title Guarantee and Trust Company, a corporation, hereinafter referred to as the "Title Company". The evidence shows that this deed to the Title Company did not contain any reservations. No reservation was made of the south 30 feet of the southeast quarter of tract 9. Such a reservation, if made, would have provided an easterly continuation of the south thirty-foot strip of said southwest quarter of tract 9 reserved by the Land Company in the aforementioned deed to Rice. The Land Company in this deed to the Title Company did not grant, or refer to, or describe any right of way over said southwest quarter of tract 9 or the west half of tract 16. By deed dated February 1, 1926, the Title Company, which was the grantee of the grantee of the original subdivider, conveyed the southeast quarter of tract 9 and the northwest quarter of tract 15. This deed contained the following reservations, to-wit: "reserving the south 30 feet of lot 9 and the north 30 feet of lot 15, for road purposes". Through mesne conveyances, and on January 24, 1936, plaintiff acquired title to the southeast quarter of tract 9 by a deed containing a reservation of the south 30 feet thereof for road purposes. Thus plaintiff acquired title to the property, the ownership of which she

now claims entitles her to a right of way across defendant Virgil McCombs' land.

By deed dated August 27, 1921, the Land Company conveyed the west half of the east half of tract 10. This deed contained no reservations. By deed dated April 16, 1920, the Land Company conveyed the east half of tract 15. This deed contained a reservation of the north 30 feet thereof for road purposes. Through mesne conveyances and on June 23, 1926, Hershel C. Baskett acquired title to said east half of tract 15 by a deed containing a like reservation. However, on June 15, 1926, the Land Company executed to Baskett a quitclaim deed covering this east half of tract 15. By deed dated February 19, 1923, the Land Company conveyed the east half of tract 16. This deed contained a reservation of the north and south 30 feet thereof for road purposes. Through mesne conveyances, and on January 30, 1928, the defendant Eva F. McCombs, wife of Virgil McCombs, acquired title to this east half of tract 16 by a deed containing like reservations. By deed dated June 22, 1921, the Land Company conveyed the west half of tract 10. This deed contained a reservation of the north and south 30 feet for road purposes. By a similar deed dated January 6, 1921, the Land Company conveyed the east half of the east half of tract 10, containing a reservation of the south 30 feet thereof for road purposes. Two days before the action herein was commenced and on October 24, 1936, the Land Company and the Title Company executed various quitclaim deeds covering the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16 to owners of parcels abutting thereon. On said date the Title Company executed a quitclaim deed to one Mabel Ruth Craig, covering the north 30 feet of the northwest quarter of lot 15, and it also executed a quitclaim deed to plaintiff Besse C. Elliott, covering the south 30 feet of the southeast quarter of lot 9. Both of these quitclaim deeds contained a provision: "Subject to an easement for road purposes over said property." On October 24, 1936, the Title Company executed a quitclaim deed to all the owners of abutting parcels, covering all of its right, title and interest in and to an easement for road purposes in and over the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16. Finally, on the same date, the Land Company executed a quitclaim deed to the same owners of abutting parcels, covering all of its right, title and interest in and to an easement for road purposes in and over the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16. In the spring of 1934, defendant Virgil McCombs planted eucalyptus trees, 10 feet apart, in a row across the west boundary of the 60-foot strip in question where the same enters Balboa avenue. Defendant Virgil McCombs each year plowed up the 60-foot strip, together with the rest of his property, and raised crops on all of the land, as his predecessor had done while he held title.

The trial court found that it was the intention of the Land Company "to create a right of way for road purposes sixty feet in width running parallel with the north and south boundaries of said quarter section midway between said north and south boundaries, and connecting the roadways bounding said quarter section on the east and west side, which roadways are now known as Hayvenhurst Avenue and Balboa Avenue respectively; * * that for several years prior to the commencement of this action said sixty-foot strip between lots 10 and 15 has been used for road purposes by the owners of property abutting thereon and their servants, agents and employees and others who chose to use the same, and that said strip is now a well-defined roadway; that at the time the defendants acquired title to their properties said strip was being so used. * * that through mesne conveyances and on January 30, 1928, the defendant Eva F. McCombs acquired title to the east half of lot 16 except thirty feet along the north and south lines thereof for road purposes; * * *" That as to the west half of lot 16 and the southwest quarter of lot 9, "there was no user of that portion of the sixty-foot strip and right of way for road purposes * * * and that while the defendant Virgil McCombs has exercised all right of ownership in so far as previous use is concerned of the property from the time he has possessed it and that his predecessor in interest Rice did so from 1919, the benefit of such easement would continue in plaintiff's land and her predecessor in interest whether acts of ownership were ever exercised by the defendant McCombs and his predecessor, Rice"; that the quiet title decree "did not affect the rights of plaintiff or her predecessors in interest to use all or any part of said sixty-foot strip for ingress and egress to and from their respective properties"; that all of the grantees mentioned in the deeds of the 60-foot strip across the entire quarter section, dated October 24, 1936, from the

Land Company to the Title Company, are the owners of "some parcel of property abutting upon said easement for road purposes, and that collectively they own all of such abutting property"; that "at the time defendants acquired their respective properties, that they had such constructive notice as was given by the public records that a reservation for road purposes, sixty feet in width lying between lots 9 and 10 on the north, and lots 15 and 16 on the south, was reserved for road purposes by the San Fernando Mission Land Company, a corporation; that at the time San Fernando Mission Land Company, a corporation, had divested itself of all interest in said southwest quarter of said section 18, supra, except its interest in said sixty-foot reservation for road purposes. It had no right, either directly or indirectly, to divest any of the land owners abutting upon the hereinbefore mentioned sixty-foot strip, of their right to the free and unhindered use of said strip for road purposes and travel." The court then found that "the defendants, and all other owners of property abutting on said sixty-foot strip, have an equal right with plaintiff to the use of said sixty-foot strip as a roadway and passageway for ingress and egress to and from their respective properties, and to and from said Hayvenhurst Avenue and Balboa Avenue".

The judgment rendered herein quiets against defendants a right in plaintiff to use said 60-foot strip over defendants' land for road purposes and also orders defendants to remove all the trees within this 60-foot strip and perpetually restrains defendants from in any way interfering with plaintiff's free use of said 60-foot strip for road purposes. From this judgment defendants prosecute their appeal.

[1-3] Respondent, in support of the judgment, argues that the reservation in the Land Company's deed to Rice and the circumstances related created an easement appurtenant to the parcel now owned by respondent; and that the abutment of respondent's parcel upon part of the terminus of the strip in question reserved in the deed to Rice was sufficient to annex to respondent's parcel the irrevocable right of its free use for the benefit of abutting landowners; and that therefore the quiet title decree against the Land Company did not divest respondent of this right, she not being a party to that action, citing Petitpierre v. Maguire, 155 Cal. 242, 100 P. 690; Syers v. Dodd, 120 Cal.App. 444, 447, 8 P.2d 157; Prescott v. Edwards, 117 Cal. 298, 303, 49 P. 178, 59 Am.St.Rep. 186. Appellants now argue that the trial court erred in the conclusion of law "that the reservations in some deeds from the Land Company of adjoining parcels of said quarter section operated to reserve for the mutual benefit of all adjoining parcels a strip of land for road purposes, comprising the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16, thereby creating an easement or quasi-easement or right of way over defendants' land for the benefit of plaintiff's land", and that before such a strip of land extending over the entire quarter section could be said to have been reserved by the Land Company, all its deeds of adjoining parcels would necessarily have to contain reservations. The evidence shows that the Land Company conveyed three of the parcels by deeds containing no reservations, and the trial court so found. The parcels conveyed free of reservations comprise about half the length of that strip which the trial court concluded the Land Company had reserved for road purposes. The parcels conveyed without reservations are interspersed between those conveyed with reservations. The deeds containing reservations did not state that the reservations were for the benefit of adjoining parcels. If the Land Company had intended these reservations to have that effect, it would have expressly so declared in the deeds, as was done in the case of Petitpierre v. Maguire, supra, relied upon by appellant. It therefore seems clear that the benefit of these reservations was intended to be purely personal to the grantor Land Company and there is nothing to indicate a different intention. Taft v. Tarpey, 125 Cal. 376, 58 P. 24. Even were it assumed that the Land Company intended the reservations to be for the benefit of the parcels conveyed without reservations, yet the grantees of those parcels conveyed with reservations had no right of way over those parcels deeded free of reservations. Thus there could be no mutuality of benefit in the adjoining landowners. The fact that a road would be convenient to the grantees could not inject into their respective deeds an intention by the grantor to create one, when the language of the deeds showed no such intent. The intention of the parties should be determined by a fair interpretation of the grant or reservation creating the easement. Berryman v. Hotel Savoy Co., 160 Cal. 559, 566, 117 P. 677, 37 L.R.A.,N.S., 5. It is the general rule that in such cases it

is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances and then to make the language of the deed bend to that.

[4] Assuming the deeds with reservations did create a road for the benefit of the adjoining parcels, then the road grew in length as the Land Company conveyed each additional parcel by a deed containing reservations for road purposes. If this were true, each grantee would not know the extent of burden imposed by the reservation, if any, in his deed until the conveyances of all the parcels were made. But this could not be, for the extent of burden of the easements reserved was determined by the individual grants themselves. Civ. Code, sec. 806; C. F. Lott Land Co. v. Hegan, 177 Cal. 169, 169 P. 1035.

[5, 6] There is no evidence that at the time of conveyance the grantees had any notice that the Land Company owned adjoining land, or that a road might be set apart out of the adjoining parcels for their mutual benefit. The map of said quarter section, recorded in 1888, showed no right of way. The individual deeds made no reference to such a road. There is no evidence that there was a use of a road to indicate its existence, nor is there any evidence that the Land Company informed the purchasers of a plan to create a road. A secret intent of the Land Company, if any, to carve a road out of the adjoining parcels conveyed for their mutual benefit could not operate to bind the grantees, else the grantees would be bound in law to investigate the subsequent deeds of the Land Company of other parcels than their own to discover this intent. However, the intention of the grantor must be determined as of the time of conveyance. Further, for such a plan to bind the grantees the intention of the grantor alone does not govern. It is the joint intent of the grantor and grantees which controls. The case of Werner v. Graham, 181 Cal. 174, at page 184, 183 P. 945, 949, aptly states the rule applicable to the instant case: "The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them—in this case the deed—constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and, in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties." See, also, Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 50, 68 P. 308; McBride v. Freeman, 191 Cal. 152, 215 P. 678; 9 Cal. Jur., p. 248.

[7, 8] This jurisdiction is replete with authority that a grantee who takes his conveyance without notice of such a plan acquires his interest free of the burdens imposed by it. It is true that an easement may be created by estoppel and where a grantor conveys lots in a tract of land under a plan, known to the grantees, to set apart a road for the benefit of the lots conveyed, a reciprocal easement in the road passes with each lot conveyed. Under this rule, however, the grantees are not bound unless at the time of conveyance they were in some way apprised of the plan or the existence of the road. Since such an easement is generally based on the doctrine of equitable estoppel, the notice to the grantee is an essential factor. The cases demonstrate that this notice may be brought home to the grantee in various ways: by the deed itself; by a map, recorded or unrecorded, showing the road; by an open, apparent use of the road, indicating its existence; by a plat or subdivision of the tract showing the road; or by the grantor designating the road by visible markings on the ground. Silveira v. Smith, 198 Cal. 510, 246 P. 58; Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024; Syers v. Dodd, 120 Cal.App. 444, 8 P.2d 157; Prescott v. Edwards, supra; Eltinge v. Santos, 171 Cal. 278, 152 P. 915, Ann.Cas. 1917A, 1143; Petitpierre v. Maguire, supra. The evidence in the instant case does not disclose notice to the grantee in any of the instances above mentioned.

[9] As applied to the facts related, we are convinced that the evidence does not justify the application of the estoppel rule. Plaintiff has shown no title by prescription. Since the trial court found that there was no user of the easement in question, no title by prescription could have been acquired. The question of the necessity of egress and ingress is not involved. On February 23, 1922, the Land Company conveyed to the Title Company the southeast quarter of tract 9 (plaintiff's parcel). This

deed to the Title Company contained no reservations. Four months later, the Land Company conveyed defendant Virgil McCombs parcel to Rice by deed, to-wit, a deed with the reservations above referred to. This deed to Rice did not declare that the easement reserved was for the benefit of any adjoining parcel. When the conveyance to Rice was made the Land Company had already conveyed the southeast quarter of tract 9 to the Title Company. The easement reserved did not attach an appurtenance to that parcel, of which the Land Company had divested itself of title. Hopper v. Barnes, 113 Cal. 636, 45 P. 874; 9 R.C.L. 737; Werner v. Graham, 181 Cal. 174, 182, 183 P. 945. Therefore, it is patent that the Land Company did not create over the southwest quarter of tract 9, or the west half of tract 16 an easement appurtenant to the southeast quarter of tract 9. Since the easement reserved in the deed to Rice was not appurtenant, then the easement was one in gross, personal to the Land Company. This quiet title judgment in favor of Rice and his successors in interest therefore was conclusive against the Land Company and its successors in interest and as plaintiff is the successor in interest of the Land Company, this judgment was conclusive against her. Knight v. All Persons, etc., 32 Cal.App. 381, 386, 162 P. 1051; Riverside Land Co. v. Jensen, 108 Cal. 146, 41 P. 40; Code Civ.Proc., secs. 751, 1908, and 1962; Baker v. Brickell, 102 Cal. 620, 624, 36 P. 950.

In conclusion, it may be thus summarized: The reservations for road purposes in the Land Company's deed to Rice vested an easement in gross in the Land Company. The subsequent quiet title judgment for Rice vitiated all rights, title or interest of the Land Company in this easement which it had reserved. By this judgment Rice's title, theretofore incumbered by said easement, was perfected against the Land Company. This perfected title was acquired by defendant here. Since this judgment was effective to divest the title in the Land Company to the easement in question, clearly then, it was error for the trial court to conclude that the judgment was of no effect to bar the plaintiff who claims her right to the easement as a successor in interest of the Land Company.

Judgment reversed.

We concur: BARNARD, P. J.; MARKS, J.



38 Cal.App.2d 26

**LOHN et al. v. FLETCHER OIL CO., Inc.**

**Civ. 2512.**

District Court of Appeal, Fourth District, California.

March 14, 1940.

**1. Action ⇐6**

In suit seeking declaration by court of rights, duties, and obligations of plaintiffs under an alleged written option granted to defendant to purchase oil, whether option was mutually abandoned, or whether a valid consideration existed, or whether option was exercised within a reasonable time, were for trial court.

**2. Contracts ⇐256**

"Abandonment of a contract" is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transaction out of which the abandonment is claimed to have resulted, and it may be implied from the acts of the parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment of a Contract".

**3. Action ⇐6**

A complaint, which alleged that demand was made on defendant to accept the oil from a well in accordance with option agreement, but that defendant refused to purchase or take all or any of it, and that a contract with a third party was made by plaintiff for sale of oil, with knowledge and consent of defendant, and in reliance on defendant's refusal to take oil, was sufficient to raise issue of mutual abandonment of option agreement.

**4. Appeal and error ⇐907(3)**

Where appeal has been perfected on judgment roll alone, it is conclusively presumed that evidence amply supports the finding, and also that all the facts found by trial court and not within the pleadings were treated by all parties as issues properly before the court during the trial of the action.

**5. Appeal and error ⇐907(3)**

The findings of a trial court must be liberally construed and, if possible, they are to receive such a construction as will uphold, rather than defeat, its judgment thereon, especially on appeal from a judgment upon the judgment roll alone.

**6. Action ⇐6**

**Trial court's finding of mutual abandonment of written option to purchase oil was not contradicted by a further finding that, after plaintiffs' well had been in production for more than a year, defendant notified plaintiffs that it elected to purchase the oil, or the finding that defendant said it was agreeable to it that contract for sale of oil for one year be made with a third party.**

**7. Contracts ⇐212(2)**

**Where option agreement is silent as to time for exercising the option, the optionee must exercise his option within a reasonable time.**

**8. Contracts ⇐212(1)**

**What is a reasonable time for the exercise of an option by the optionee depends upon the facts of the particular case.**

**9. Action ⇐6**

**Trial court's finding, that defendant did not exercise its option to purchase oil within a reasonable time and that therefore option agreement was unenforceable, was not contradicted by finding that plaintiffs informed defendant that it had opportunity of making a contract for one year with third party for purchase of oil, and that thereupon defendant stated that it did not need and could not use the oil produced from plaintiffs' well, and that it was agreeable to defendant that such contract be made, where trial court also found that demand was made on defendant to accept production from the well, and defendant refused.**

---

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Suit by A. W. Lohn and others, as trustees of the Colly Oil Company, a corporation, against the Fletcher Oil Company, Incorporated, formerly known as the Los Angeles Refining Company, a corporation, for a declaration by the court of the right, duty, and obligations of plaintiffs under an alleged written option to purchase oil, wherein the defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Proctor K. Perkins, of Los Angeles, for appellant.

Raphael Dechter, and B. L. Hoyt, both of Los Angeles, for respondents.

THOMPSON, Justice pro tem.

This is an appeal from a judgment in a suit for declaratory relief, upon the judgment roll alone.

The record discloses that the respondents, as trustees for the benefit of the creditors of the Colly Oil Company, filed a complaint against appellant, seeking a declaration by the court of the rights, duties and obligations of respondents under an alleged written option to purchase oil.

On April 3, 1935, and prior to the time respondents became such trustees, Colly Oil Company entered into an agreement in writing with appellant which gave appellant the right and option to purchase all or any part of the oil and gas produced from a well then being drilled by the Colly Oil Company, and to pay the posted market price therefor. In August, 1935, the well was placed on production. It is alleged in the complaint and found by the court in its findings, that demand was made upon appellant that it accept the production in accordance with the terms of the option, and that appellant refused to purchase or take any part of the production. It is further found by the trial court that, on August 20, 1935, Colly Oil Company informed appellant that it had an opportunity to make a contract for one year with the Mercury Petroleum Corporation, Inc., and thereupon appellant stated that it did not need and could not use the oil produced from said well, and that it was agreeable to appellant that such contract be made, and that "on said 20th day of August, 1935, the agreement of April 3, 1935, was abandoned by the mutual consent of the parties thereto". The trial court also found that no consideration existed for the granting of the option; that said option agreement is unenforceable because it is uncertain in that it does not specify the quantity of oil to be purchased by defendant and it lacks mutuality, and the option "was not exercised within a reasonable time, such exercise of option not taking place until August 4, 1936". The trial court further found that plaintiffs did not assume the option agreement, "that an actual controversy and bona fide dispute exists between the plaintiffs and defendant herein relating to the legal rights, duties and obligations under the terms of said alleged contract of April 3, 1935", and that this is a proper case for the court to ex-

ercise its discretion to declare the rights of the parties under said contract. The trial court entered judgment that said agreement of April 3, 1935, is unenforceable and of no effect and that respondents are entitled to dispose of the oil from the well free from liability by reason of said agreement and enjoining defendant from asserting any claim against the oil or gas from said well by reason of said agreement.

Appellant's contentions on appeal may be briefly summarized as follows: that the findings of fact do not support the conclusion of law to the effect that there was an abandonment of the contract, or the conclusion of law that no consideration existed for the granting of the option, or the conclusion of law that the agreement is void for uncertainty; and that the finding of fact that the defendant's election to exercise the option was not made within a reasonable time is contradicted by other findings.

[1] The question of whether or not the option was mutually abandoned, or whether or not a valid consideration existed, or whether or not the option was exercised within a reasonable time are matters to be determined by the trial court and, if the judgment can be sustained upon any one of these findings it must be affirmed.

[2-6] The complaint alleges that demand was made on appellant to accept the oil from the well in accordance with the option agreement, but that appellant refused to purchase or take all or any of it, and that the contract with the Mercury Petroleum Corporation, Inc., was made with the knowledge and consent of appellant and in reliance on its refusal to take said oil. These allegations are denied by the answer, but the trial court found that they were true and found that appellant "stated that it did not need and could not use the oil"; and that the option agreement was abandoned by the mutual consent of the respondents and appellant. Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transaction out of which the abandonment is claimed to have resulted. It may be implied from the acts of the parties. Treadwell v. Nickel, 194 Cal. 243, 259, 228 P. 25. Appellant points out that abandonment is not alleged in the complaint. We believe the allegations above referred to are sufficient to raise the issue of mutual abandonment of the contract. But even if they were not, it would be of no avail to appellant for the reason that where, as here, the appeal has been perfected on the judgment roll alone, it is conclusively presumed not only that the evidence amply supports the findings (Ochoa v. McCush, 213 Cal. 426, 430, 2 P.2d 357; Delanoy v. Delanoy, 216 Cal. 23, 27, 13 P.2d 513), but also that all the facts found by the court and not within the pleadings were treated by all parties as issues properly before the court during the trial of the action; that the pleadings were treated as sufficient to raise the issues upon which the findings were made; and that the evidence in support of such issues was received without objection. Chow v. City of Santa Barbara, 217 Cal. 673, 681, 22 P.2d 5; Samuels v. Singer, 1 Cal. App.2d 545, 552, 36 P.2d 1098, 37 P.2d 1050. Appellant also asserts that the finding of mutual abandonment is contradicted by the further finding to the effect that after said well had been on production for more than a year appellant notified respondents that it elected to purchase the oil, and the finding that appellant said it was agreeable to it that the contract be made with the Mercury Petroleum Corporation, Inc. We cannot agree with this contention. The findings of a trial court must be liberally construed and, if possible, they are to receive such a construction as will uphold, rather than defeat, its judgment thereon. Ochoa v. McCush, supra, 213 Cal. 430, 2 P.2d 357. Especially is this true on appeal from a judgment upon the judgment roll alone. Hamberger, etc, v. Lewin, 101 Cal.App. 704 282 P. 425; Middleton v. Parsons, 22 Cal.App.2d 250 251, 70 P.2d 515. It would be an unwarranted and unjust interpretation of the option agreement to hold that, after appellant refused to purchase any of the oil from respondents and stated that it did not need and could not use any of the oil, and thereby induced respondents to enter into a contract with a third party for the sale of the oil, it might wait more than a year and then revive the agreement by notifying respondents that it exercised the option to purchase the oil. The only reasonable construction of the findings relative to the question of abandonment of the option agreement impels the conclusion that they are not inconsistent and that they sustain the judgment.

[7-9] Counsel for appellant urges that, because no time limit was expressly fixed in the option agreement for the exercise

of the option, and because appellant could not have obtained the oil if it had attempted to exercise its option during the year that the Mercury Petroleum Corporation, Inc., contract was in force, it was necessary for it to wait until the expiration of that contract before notifying respondents that it elected to exercise its option, and for that reason its exercise of the option was within a reasonable time. It is a well-settled principle of law in this state that, where the option agreement is silent as to the time for exercising the option, the optionee must exercise his option within a reasonable time. 25 Cal.Jur., p. 517, sec. 42; Standard Box Co. v. Mutual Biscuit Co., 10 Cal.App. 746, 750, 103 P. 938; Smith v. Bangham, 156 Cal. 359, 363, 104 P. 689, 28 L.R.A.,N.S., 522. The court found that the option was not exercised within a reasonable time, and that appellant notified respondents of its election to exercise the option after the option agreement had been abandoned by the mutual consent of the parties thereto. It is true that the trial court found that said Colly Oil Company informed appellant that "it had the opportunity of making a contract for one year with the Mercury Petroleum Corporation"; that thereupon the appellant "stated that it did not need and could not use the oil produced from the well of the Colly Oil Company, and that it was agreeable to them that such contract be made". But the court also found that demand was made on appellant to accept the production from the well and appellant refused to purchase or take all or any part of said oil. There is nothing inconsistent or contradictory about these findings. They could all be true and the court would be justified in finding, perhaps compelled to find, that an attempted exercise of the option a year later was not within a reasonable time. What is a reasonable time for the exercise of an option by the optionee depends upon the facts and circumstances of the particular case and in this case it was a matter for the trial court to determine. It is incumbent upon the appellant to show error by the record on appeal. No transcript of the evidence being before us and nothing appearing in the record to indicate an erroneous finding on the subject, we must assume that the evidence was sufficient to sustain the finding on that issue. Ochoa v. McCush, supra.

If either the trial court's conclusion that the option agreement was mutually abandoned, or its finding that appellant did not exercise its option within a reasonable time, is correct and sustained by the record on appeal, the option agreement is unenforceable and the judgment must of necessity be affirmed. It is our conclusion that both stand unimpeached on the record before this court and amply support the judgment. We therefore deem it unnecessary to determine or comment upon the other matters touched upon in the briefs of counsel.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.




## SANDERSON v. NIEMANN et al. *

Civ. 12453.

District Court of Appeal, Second District, Division 2, California.

March 15, 1940.

Rehearing Denied April 4, 1940.

Hearing Granted May 13, 1940.

1. Courts ⇐87

Where exact question had apparently never been presented to appellate courts of the state, the District Court of Appeal was required to consider the matter in the light of the state's juridical and legislative policy to the end of deriving a just and enlightened decision.

2. Husband and wife ⇐270(1)

Though an action for injuries to a wife is "community property," a wife may, in view of statute, bring an action for injury to her person without her husband being joined. Civ.Code, §§ 162, 164; Code Civ. Proc. § 370.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

3. Husband and wife ⇐270(1)

On entering court to recover for personal injuries, a wife whose husband does not join in the suit comes as a separate entity, to be dealt with as a distinct agency by the court in the trial and in the judgment entered. Code Civ.Proc. § 370.

* For subsequent opinion, see 110 P.2d 1025.

**4. Husband and wife ⇐270(5)**

**Though a wife is authorized by statute to sue alone without joining her husband for personal injuries, there is no express inhibition against joining her husband with her as a party plaintiff. Code Civ.Proc. § 370.**

**5. Judgment ⇐597**

**A valid judgment in an action by wife and husband for expenses incurred for physician's hire, made necessary by injuries sustained by the wife in an automobile accident, bars a subsequent action by the wife alone, based on the same accident and injuries. Code Civ.Proc. § 370.**

**6. Common law ⇐9**

**The policy of the law is to minimize the number of lawsuits in effectuating justice.**

Appeal from Superior Court, Los Angeles, County; Clement D. Nye, Judge.

Action by Hazel Sanderson against Charles Niemann, Jr., individually and doing business as the Hillside Motor Company, and others to recover damages for personal injuries sustained in an automobile collision. From a judgment dismissing the action, the plaintiff appeals.

Judgment affirmed.

Jack R. Kates and Kenneth C. Miller, both of Los Angeles, for appellant.

Mills, Hunter, Dunn & Liljestrom, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment barring her action for damages resulting from personal injuries alleged to have been caused by defendant's negligence in the operation of an automobile. Prior to the present action, plaintiff and her husband, Job Sanderson, filed suit against defendant Niemann in the small claims division of the municipal court of Los Angeles, in which they sought to recover $49 "for auto damage and Dr. bill due to personal injury". Following that trial, judgment was entered in their favor for $12.58 which was paid. At the trial of the present action, plaintiff testified that, in the former action, she had recited from the witness stand facts concerning the nature of her injuries. The judge, who heard the case, also testified that she gave testimony relative to the character of injuries she had received. The small claims court had jurisdiction of the case.

Subsequently, plaintiff alone instituted this action against said Niemann and one Frost to recover damages suffered by her in the identical motor car collision out of which arose her said first action. Said Frost was alleged to have been the driver of defendant's car at the time of the accident, but he was never served with process and as to him the action was dismissed.

[1] After plaintiff and the judge of the inferior court had given their said testimony, objection was made to any further evidence upon the ground that plaintiff's cause of action was barred by force of the rule which inhibits the splitting of causes. The court sustained said objection and thereupon ordered a dismissal of the action. The question before us on this appeal is: Does a valid judgment in an action brought by a wife and her husband for expenses incurred for physician's hire made necessary by injuries suffered by the wife in a motor traffic accident, bar an action subsequently filed by the wife alone, based upon the same accident and injuries? Since the exact question does not appear ever to have been presented to the appellate courts of this state, we are required to consider the matter in the light of our juridical and legislative policy to the end of deriving a just and enlightened decision. Plaintiff bases her contention upon two propositions, namely, (1) since the wife is in privity with the husband in the ownership of a claim based upon injuries to her body, she should be permitted to join him in an action for any consequential damage to her without peril to her separate action; and (2) since the first action was by the husband for damages consequential to her said injuries, the judgment entered therein will be conclusive upon the issue of negligence.

[2-6] (1) The problem presented by the first proposition is solved by a consideration of the code provisions relative to the ownership of property by the husband and wife and of the legislative changes of such provisions as well as of the code sections with reference to parties to civil actions. An action for injuries to the wife is community property. Civ.Code, secs. 162, 164. Prior to 1913 the husband had control of all community property. Hence, prior to amendment, he was a necessary party in the wife's action for injuries to her person. But in that year the law was

changed so that a married woman might sue, without her husband's being joined as a party, for injury to her person, Code Civ.Proc. sec. 370, although he still has the management and control of the community property. Civ.Code, sec. 172a. At the same time section 427 of the Code of Civil Procedure was amended so that in any action brought by the husband and wife to recover damages for injury to the wife, all consequential damages sustained by the husband might be alleged and recovered without separately stating such cause of action; also, that causes of action for injuries to person and injuries to property growing out of the same tort may be joined in the same complaint without separately stating such cause of action. As a result of said amendments to the laws affecting the relation of husband and wife, a wife is no longer obliged to wait for the consent of her husband to enforce the payment of losses suffered on account of her personal injuries. On entering court for such purpose, she comes as a separate entity, to be dealt with as a distinct agency by the court in the trial and in the judgment entered. Although she is permitted by said section 370 to sue alone for such damages, yet there is no express inhibition against joining her husband with her as a party plaintiff. Johnson v. Hendrick, 45 Cal.App. 317, 187 P. 782. Therefore, when she once, in a court that has jurisdiction, plights her faith to a claim for damages due to her own personal injuries, her die is cast. Having, in such forum, stated that the basis of her demand is the negligence of the defendant, then all of her claims founded upon such negligence must then and there be fully exposed and the merits tried to the end that judgment may be final as between herself and the defendant. If her husband first seek compensation for losses he has suffered by reason of her injuries instead of joining with her, he must, if two distinct actions are contemplated, alone enter the appropriate court for redress and in view of the enlightened provision of said section 427 of the Code of Civil Procedure, even such separate action would not be encouraged, it being the policy of the law to minimize the number of lawsuits in effectuating justice. But, if the wife joins her husband in an action for such consequential damages, the author of her alleged injuries has a right to expect that any judgment which they obtain in such joint action will result in an adjudication of all claims of either based upon defendant's negligence.

Plaintiff's said "Small Claims" action was for damages resulting from her injuries; so, also, is her present action. There, she sought special damages arising from the hire of a physician because of her injuries; here she seeks general damages for her suffering sustained from the same injuries. But both were based upon defendant's negligence. Provision having been made for her to unite any of her own claims in one suit, and likewise any claims of her husband, she apparently spurns the generosity of the law for a tactical advantage. Such a procedure is contrary to the spirit of our code and is not supported by our decisions.

The principle applicable here is exemplified in a measure in the case of Kidd v. Hillman, 14 Cal.App.2d 507, 58 P.2d 662, 663. The plaintiff there first sued for injuries to her person and her clothing. She recovered and the judgment was paid. She then sued for damages to her automobile. She was denied recovery because "she cannot now pursue appellant in another action for damage to her property arising out of the same accident".

From the reasoning of that court, it appears to be a sound principle that when a married woman seeks legal redress of her grievance, she is subject to the same rules that govern her spinster sister. Therefore, it may be declared as a wholesome rule that a judgment, obtained by a married woman against her tort-feasor on any account, is adjudicata of any other claim she may have had arising out of the same negligence committed by the same feasor. Cases cited by plaintiff are not applicable because they refer to the right of the husband alone to sue for consequential damages. Martin v. Southern Pacific Co., 130 Cal. 285, 62 P. 515; Tell v. Gibson, 66 Cal. 247, 5 P. 223; 1 Cal.Jur. 346; Lamb v. Harbaugh, 105 Cal. 680, 39 P. 56.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

38 Cal.App.2d 75

## TAYLOR v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 12412.

District Court of Appeal, Second District, Division 1, California.

March 20, 1940.

**1. Workmen's compensation ⇐1730**

In workmen's compensation case, the fact that referee had already, by findings made at original hearing, expressed an opinion concerning merits of case, did not of itself disqualify referee from presiding at rehearing. St.1937, p. 293, § 5311; Code Civ. Proc. § 641, subd. 6.

**2. Workmen's compensation ⇐1937**

In workmen's compensation case, denial of employer's motion to disqualify, on rehearing, referee who had presided at original hearing on ground that referee had made up his mind that employer was guilty of serious and willful misconduct, was not prejudicial to employer where referee's opinion was based on evidence before him on original hearing and there was no showing that should other or additional evidence be produced on rehearing, his decision would be the same as on original hearing. St.1937, p. 293, § 5311; Code Civ.Proc. § 641, subd. 6.

**3. Workmen's compensation ⇐1079, 1408, 1765.**

The industrial accident commission is a "judicial body" and its decisions and award are subject to the general legal principles which circumscribe and regulate the judgments of all judicial tribunals and sufficiency of evidence to sustain commission's finding must be determined in light of rules applicable to procedure in courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Body".

**4. Workmen's compensation ⇐1742**

Where workmen's compensation case was heard by referee who made report which was reviewed by another referee and thereafter industrial accident commission made finding that injury was caused by the "serious and willful misconduct of the employer", the finding was totally inadequate, since it was but a mere conclusion of law. St. 1937, p. 294, §§ 5313, 5315.

**5. Workmen's compensation ⇐1738**

In workmen's compensation case, the findings of industrial accident commission should be so framed that the defeated party can specify intelligently the particulars in which they are not supported by evidence where such point is made, and findings should be such that the truth or falsity of each material allegation in issue can be demonstrated from the findings.

**6. Workmen's compensation ⇐1740**

In workmen's compensation case, the findings of the industrial accident commission must disclose the theory upon which they are grounded when the issue is controverted.

**7. Appeal and error ⇐994(3), 1012(1)**

An appellate tribunal is not in a position to judge of the credibility of witnesses or the value and weight of evidence, but must determine the truth or falsity of allegations in issue from findings made thereon by the trier of facts.

**8. Workmen's compensation ⇐1820**

In workmen's compensation case, the industrial accident commission may use the report of referee in its entirety or in part as a basis for a decision or award, or, if dissatisfied with referee's report, the commission is authorized to resort to the record in the case. St.1937, pp. 293, 294, §§ 5310, 5313, 5315.

**9. Workmen's compensation ⇐1820**

In workmen's compensation case, where industrial accident commission adopts facts found and decisions recommended by referee who was authorized to and did hear evidence, commission is not required to review record and commission's award is not objectionable on ground that commission did not consider or decide the case. St.1937, pp. 293, 294, §§ 5310, 5313, 5315.

---

Certiorari proceeding by Wallace Taylor to review an award of the Industrial Accident Commission of the State of California in favor of Zella Thomas, surviving wife of Walter J. Thomas, and Donna Marie Thomas, a minor, by her guardian ad litem and trustee, Zella Thomas, granting additional benefits based upon asserted serious and willful misconduct of Wallace Taylor, employer.

Award annulled and cause remanded with directions.

F. Britton McConnell, of Los Angeles, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondent Industrial Acc. Commission.

WHITE, Justice.

This cause comes before us on a writ of certiorari issued upon the application of petitioner, Wallace Taylor, to review an award made by respondent Industrial Accident Commission in favor of the surviving wife and minor children of Walter J. Thomas, who was employed by petitioner as a well driller in connection with the drilling of an oil well at Montebello, California, and who sustained injuries, arising out of and occurring in the course of his employment, which proximately caused his death on the day following. In addition to its award of the normal compensation benefit, the commission increased such award one-half, or in the sum of $2,500, for the serious and wilful misconduct of the employer. It is not contended that decedent's dependents were not entitled to the normal award; and petitioner here seeks only a review of the additional award of $2,500 for the serious and wilful misconduct charged against him. Therefore the only question involved here is as to the legality of the award made against the employer based upon the findings that decedent's injury was caused by the serious and wilful misconduct of such employer.

There is no serious conflict in the facts, which epitomized are that petitioner, Wallace Taylor, was drilling an oil well at Montebello, and the deceased, Walter J. Thomas, was employed as a driller, in which capacity he was in charge of the well and a crew of men. Decedent and his crew came on shift at 12 o'clock midnight, and the accident resulting in his death occurred shortly after 1:30 a. m. The drilling on the well had been completed a few days before the accident, and the "blowout preventer" required to be used and which was used during the drilling operations was detached from the well and removed from the premises. It might here be stated that a "blowout preventer" is a valve device commonly in use in oil well drilling operations. Its use in such operations is required under the Oil and Gas Conservation Law (Act 4916, Deering's Gen.Laws, sec. 3; Stats. 1915, p. 1404, and amendments) to "prevent blowouts, explosions, and fires". Its use was also required by ordinance No. 262 of the city of Montebello in effect at the time of the accident. The initial production test proving unsatisfactory, it was decided to deepend the well by further drilling operations. To accomplish this it was necessary to pull out the tubing before drilling operations could be recommenced. The crew working the shift which ended at midnight was engaged throughout that shift in pulling the tubing, and completed this operation about 12 o'clock. It further appears that on the same night petitioner Taylor made arrangements for the delivery of the "blowout preventer", with the necessary fittings and pipe, to the premises upon which the well was located. Petitioner Taylor talked with decedent, Thomas, shortly before midnight, and instructed the latter to install the "blowout preventer", which was then on its way, and further stated that Mr. Simms, another employee, would be there shortly with the "blowout" equipment and would assist in putting it on. Following the giving of these instructions, Taylor left the premises.

At about the time for the change of shifts Mr. Simms arrived with the "blowout" equipment. He had received instructions from petitioner Taylor to stay at the well while the "blowout preventer" was being installed in the event any welding was necessary, and also to assist in the installation of such "blowout preventer". Upon his arrival at the premises Simms reported to the driller, decedent Thomas, and advised him of his readiness to put the "blowout preventer" on. The record discloses that, contrary to the instructions given him by his employer Taylor, the decedent Thomas told Simms that he would wait until daylight to put the "blowout preventer" on, and instructed Simms to return early in the morning, thus leaving the "blowout preventer" unattached to the well. Upon directions from decedent Thomas, the crew commenced the drilling operations, the first phase of which was to make up pipe. While the crew was so engaged, approximately 1½ hours later, the "blowout" occurred, at which time, as hereinbefore indicated, the "blowout preventer" was unattached to the well. Prior to the occurrence of the first puff of gas constituting the "blowout", the well had been what in drilling parlance is termed "killed" by filling it with water. At the time of the "blowout"

the derrick man, Phillips, was up on the derrick in connection with the operation of making up pipe. When the well began to blow out from the force of the gas puffing up through the water in the well hole, some water was forced up out of the well hole and upward to a height of about four feet above the derrick floor. This liquid was striking against and dropping from tongs attached to a length of drill pipe which was being made up. One of the members of the drilling crew started to detach the tongs, and while doing this was instructed by the derrick man Phillips, who was then descending the derrick, not to do this, and in accordance with such directions he discontinued. About that time decedent Thomas, who was in charge of the crew, ordered that the pumps be started, which, the evidence indicates, was intended to pump additional water from the slush pit into the well hole to replace that which had been displaced by the "blowout". It appears that Phillips felt that this procedure was not proper and called out to "leave them [pumps] alone". At this juncture decedent Thomas, who was on the floor of the derrick, called back that there was nothing to get excited about and to go ahead and open the pumps. It appears that in carrying out this order given by decedent Thomas, one of the men at the pumps opened a valve that should have been left closed if it was intended to pump water into the hole. The opening of this valve allowed gas pressure in the well to be lined up through an open pipe line leading out to the sump instead of directing a flow of water from the slush pit into the well hole. A sump on an oil lease is used to hold mud sometimes used in drilling operations and to hold oil and liquid which may flow from the well. Mud in the sump is mixed or churned by a strong flow of water directed through a nozzle on the bank of the sump, which nozzle is commonly called a mud gun. It appears, however, that when the wrong valve was opened, a stream of oil, water and gas was projected from the well hole through the pump manifold out through a line of pipe to the mud gun on the edge of the sump. This mixture shot from the mud gun back toward the boilers which decedent Thomas was using. The stream from the mud gun became ignited and the fire traveled back along the course of the stream to the sump and the sump took fire. From there a flame was seen to travel along the ground toward the derrick, and an explosion occurred on the floor of the derrick. Decedent Thomas and the derrick man Phillips were on the derrick floor at that time and both were burned, Thomas so severely that as a result thereof he died on the following day.

Petitioner first contends that the procedure followed by the commission in this case was not in accord with, but in violation of, the powers and duties conferred upon it by law. In this connection it should be observed that following the original hearing, a rehearing was granted. When the matter was called for rehearing petitioner herein in his capacity as employer, objected to the same taking place before the referee who had presided at the original hearing, on the ground that such referee had already made up his mind that the employer was guilty of serious and wilful misconduct. This objection was overruled. To the decision of the commission ordered after rehearing petitioner interposes two other objections: first, that with reference to the issue of serious and wilful misconduct the finding that "said injury was caused by the serious and wilful misconduct of the employer" is totally insufficient and in fact amounts only to a conclusion of law; second, that while the decision was purportedly rendered by "the Commission", in truth and in fact the three commissioners who signed the decision did not at any time "consider" or "decide" the case.

[1, 2] With reference to the objection made to the referee, section 5311 of the Labor Code, St.1937, p. 293, provides that such objection may be made on any of the grounds specified in section 641 of the Code of Civil Procedure. We find in the last-named section that subdivision 6 thereof authorizes an objection to the referee when such officer has "formed or expressed an unqualified opinion or belief as to the merits of the action". Conceding that the referee in the instant proceeding had already, by his findings made at the original hearing, "expressed an opinion" concerning the merits of the cause, that does not in our judgment of itself disqualify him from presiding at a rehearing of the cause, for the reason that his opinion as to the merits of the case as embodied in his original findings was based upon the evidence then before him and upon his conception of the law as applied to such evidence. There is

no showing that the opinion of the referee was a fixed one, or that should other or additional evidence be produced upon a rehearing his decision would be the same as on the original hearing. The very fact that a rehearing was granted upon the suggestion as well as the concurrence of such referee to our minds indicates a lack of bias or prejudice or fixed opinion upon his part as to the merits of the case. We perceive no prejudice to the petitioner arising out of the denial of his motion to disqualify the trial referee.

[3-6] We come now to a consideration of the sufficiency of the finding on the issue of serious and wilful misconduct. In Gouanillou v. Ind. Acc. Comm., 184 Cal. 418, 193 P. 937, 938, it was said: "Since the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals." Therefore, the sufficiency of the questioned finding must be determined in the light of rules applicable to such procedure in our courts. Section 5313 of the Labor Code provides that the referee shall report his findings in writing to the commission within fifteen days after the testimony is closed, and provides further that "the facts found and conclusions of law shall be separately stated". Section 5315 of the Labor Code clothes the commission with power to confirm, adopt, modify or set aside the report of the referee or any part thereof, and to enter its order, findings, decision or award, based in whole or in part upon the report of the referee, or upon the record in the case. In the cause before us the record discloses that the referee conducted the hearing and made a detailed and comprehensive report thereon, embodying his conclusions. This report was forwarded to the San Francisco office of the commission, where it was reviewed by another referee, who briefly epitomized the facts and made a recommendation that a normal award be made coupled with the additional award based on the serious and wilful misconduct of the employer. Thereafter the commission rendered its "decision after rehearing", which included findings that so far as the issue of serious and wilful misconduct of the employer was concerned, contained only the following language: "Said injury was caused by the serious and wilful misconduct of the employer." Such a finding is totally inadequate, and does not amount to a finding at all. It is a mere conclusion of law. Findings should be so framed that the defeated party can specify intelligently the particulars in which they are not supported by the evidence, where such point is made. In the case at bar the finding under review is general and indefinite. While it is not necessary that the facts as found must be in any particular form or follow the pleadings, it is nevertheless essential that findings be such that the truth or falsity of each material allegation in issue can be demonstrated from the findings. Measured by this rule, the finding here in question falls far short of what is required to comply with the law. The findings must disclose the theory upon which they are grounded when the issue is controverted. If, for instance, the commission based its finding of serious and wilful misconduct upon the part of the employer on his failure to erect upon the well premises a firewall, firebreak, windbreak, partition, or housing between the well and the boilers, or upon the violation of ordinance, statute, or regulation, then it should so state, to the end that this court may be in a position to determine whether the theory upon which the finding was predicated is supported by the evidence.

[7] An appellate tribunal is not in a position to judge of the credibility of witnesses or the value and weight of evidence, but must determine the truth or falsity of the allegations in issue from the findings made therefrom by the trier of facts.

[8, 9] Although it becomes necessary to remand the cause to the commission for further findings, we are disposed to give consideration to the other point raised on this appeal, to the end that reargument and rebriefing thereof may not become necessary following the remaking of its findings by the commission. With reference to petitioner's contention that the three commissioners who signed the decision did not at any time in fact "consider" or "decide" the case, we are impressed that the same is without merit. The Labor Code authorizes the commission to appoint referees, which referees are clothed with the power, jurisdiction and authority granted by law, contained in the order of appointment, and fixed by the rules of the commission. Labor Code, sec. 5310. Referees so appointed re-

port their findings to the commission. Labor Code, sec. 5313. Upon the filing of the report of the referee the commission, as heretofore pointed out, is authorized to confirm, modify, adopt or set aside such report, in whole or in part, and may base its decision or award "upon the report of the referee, or upon the record in the case". Labor Code, sec. 5315. It is at once apparent that the very object of the statute is to enable the commission to use the report of the referee in its entirety or in part as the basis for a decision or award, or, if dissatisfied with such referee's report, the commission is authorized to resort to the record in the case. In basing its decision in the instant case upon the report of the referee, the commission violated none of petitioner's rights. The Labor Code authorizes the commission to delegate to its referees the hearing of evidence in industrial accident cases, and such referee, who heard the evidence and the arguments thereon, is authorized to make findings and to recommend a decision or award based thereon. When the commission adopts the facts found and the decision recommended by the one who is authorized to and does hear the evidence, then the commission is not required to review the record. An entirely different situation would be presented if the commission, disregarding and setting aside the findings and recommendation of the referee, undertook, without a review of the evidence, to appraise the same and make determinations based thereon. Such is not the case here presented.

The conclusion at which we have arrived with reference to the commission's finding of serious and wilful misconduct on the part of the employer renders unnecessary a discussion of the final contention of petitioner as to the sufficiency of the evidence to support such finding.

The award by the commission of additional benefits based upon the asserted serious and wilful misconduct of petitioner in his capacity of employer is annulled, and the cause remanded to the commission with directions to make further and additional findings upon the controverted issue of serious and wilful misconduct of the employer in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

38 Cal.App.2d 39

## PEOPLE v. LENAHAN.

Cr. 2108.

District Court of Appeal, First District, Division 2, California.

March 18, 1940.

Rehearing Denied April 2, 1940.

Hearing Denied April 15, 1940.

**1. Larceny ⇐65**

Evidence *held* sufficient to support conviction of grand theft.

**2. Criminal law ⇐1159(2)**

An appellate court may not interfere with trial court's implied fact finding, supported by direct, substantial evidence, against defendant appealing from conviction of crime.

**3. Criminal law ⇐351(3)**

In trial for grand theft, evidence of defendant's flight when he knew he was charged with such crime was properly admitted and considered by jury with all other facts and circumstances as tending to prove defendant's consciousness of guilt.

**4. Larceny ⇐41**

In trial of attorney for grand theft of client's corporation stock, pledged by defendant with bank as additional security for his own indebtedness thereto, prosecution was bound to prove only that such stock had reasonable and fair market value exceeding $200. Pen.Code, §§ 484, 487.

**5. Larceny ⇐59**

In trial of attorney for grand theft of client's corporation stock, pledged by defendant with bank as additional security for his own debt thereto, evidence *held* sufficient to sustain trial court's implied finding that stock had reasonable and fair market value exceeding $200. Pen.Code, §§ 484, 487.

**6. Criminal law ⇐452(1)**

The general rule that owner of property may testify regarding its value applies where value of shares of capital stock is in issue on trial for grand theft. Pen.Code, §§ 484, 487.

---

Appeal from Superior Court, Monterey County; James D. Garibaldi, Judge.

John W. Lenahan was convicted of grand theft, and he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Melvin M. Belli, of San Francisco, and John Milton Thompson, of Monterey, for appellant.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Dennis Hession, of San Francisco, for respondent.

SPENCE, Justice.

Defendant was found guilty of the crime of grand theft upon a trial by the court sitting without a jury. His motion for a new trial was denied and the trial court pronounced judgment placing defendant on probation for a period of six years with the condition that the first year thereof be served in the county jail. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

Defendant was an attorney at law duly licensed to practice in this state. In 1936, defendant was engaged by Mr. Duarte, the complaining witness, to bring an action against the Postal Union Life Insurance Company for the rescission of a transaction in which Mr. Duarte had parted with securities having a face value of $24,000 for 967 shares of the stock of that company. The stock certificate, endorsed in blank by Mr. Duarte and his wife, was delivered to defendant in January, 1937, for the purpose of tendering said certificate to said company and demanding the return of the consideration given. The tender was refused and the certificate remained in the possession of the defendant until June, 1937. At that time, defendant pledged said stock with a bank as additional security for an indebtedness of $9,750 which he personally owed to said bank. Mr. Duarte first learned of the pledge of the stock when he was notified in 1938 that a new certificate had been issued in the name of the bank. Mr. Duarte consulted the district attorney about this matter. The district attorney talked with defendant and told him that "Something looks funny about it." Defendant asked, "If I satisfy Duarte, or if I talk with Duarte and straighten this out, then are you satisfied?" The district attorney then said "If Duarte don't come back to the office, as far as I am concerned there will be no warrant issued." Defendant got in touch with Mr. Duarte immediately and arranged to see him at the office of a San Francisco attorney on the following day. Defendant left by plane for Seattle that night and wired Mr. Duarte that he would not meet him personally on the following day as planned. Within a day or two after arriving in Seattle, defendant learned that a warrant had been issued for his arrest and thereafter defendant was not heard from until about six months later when he was arrested in Rockford, Illinois, for issuing a check under the alias of John O'Brien. He admitted that he knew that the police were looking for him during all of that time and he further admitted that he had traveled under various aliases in several states in the east. He was employed as a traveling salesman, selling law books, at the time of his arrest.

[1-3] Defendant contends that the evidence was insufficient to support the judgment of conviction but we find no merit in this contention. There was a direct conflict in the evidence on the question of whether defendant did or did not have authority to pledge the stock to the bank as security for his own obligation. Mr. Duarte testified that defendant had no such authority while defendant testified that he had. There was direct, substantial evidence to support the implied finding of the trial court against the defendant and, such being the case, an appellate court may not interfere. Defendant apparently claims that undue emphasis was placed on the evidence of flight. It is well settled that the evidence showing the flight of the defendant, when he knew he was charged with crime, was properly admitted and was properly considered with all other facts and circumstances as tending in some degree to prove a consciousness of guilt. People v. Jones, 160 Cal. 358, 117 P. 176; People v. Sainz, 162 Cal. 242, 121 P. 922; 8 Cal. Jur. 44, 158. There is nothing to indicate that any undue emphasis was placed on such evidence here.

[4-6] A second claim of insufficiency is that the evidence was insufficient to show that the stock had "a value exceeding two hundred dollars". Pen.Code, sec. 487. Under section 484 of the Penal Code, such "value" is "the reasonable and fair market value". We believe this claim is likewise without merit. It was only necessary in the present case for the prosecution to prove that the 976 shares of stock had a "reasonable and fair market value" in excess of $200. Mr. Duarte, the owner of the stock, testified that the stock had a par value of $10 per share and that the value "according to the market" was around $6 per share in 1937. He further testified that just before defendant went away, defendant

stated that the stock "was worth two or three dollars a share". Other testimony relating to value was admitted but we believe that the foregoing evidence was ample to sustain the implied finding of the trial court relating to value. Defendant concedes the existence of the general rule which permits the owner of property to testify regarding its value (10 Cal.Jur. 1023), but he asserts that this rule has no application where the value of shares of capital stock is in issue. We know of no authority so limiting the application of the rule.

The judgment and order denying the motion for a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




37 Cal.App.2d 713

**JOHNSON et al. v. WESTERN AIR EXP. CORPORATION et al.**

**JOHNSON v. SAME.**

**Civ. 12368, 12369.**

District Court of Appeal, Second District Division 1, California.

March 12, 1940.

**1. Appeal and error ⇐654**

Where trial court ordered that certain amendments to conform to proof be filed nunc pro tunc, but because of regular clerk's absence and inadvertence of substitute clerk transcripts were transmitted to reviewing court without such amendments and respondent's counsel failed to disclose such omission upon discovering it, appellants' reliance on county clerk's attaches was not inexcusable and diminution of record by filing of consolidated supplemental clerk's transcript containing such amendments would be allowed.

**2. Appeal and error ⇐654**

Appellate courts look with favor upon an amendment enabling them to review the lower court's decision in view of all the facts which lower court had before it when it made the decision.

Separate actions by Osa Johnson and by Osa Johnson and Freda Cripps, as the surviving and sole heirs of Martin E. Johnson, deceased, against the Western Air Express Corporation and another. From adverse judgments, plaintiffs appeal. On application of appellants to file supplemental transcript containing amendments to conform to proof.

Application granted.

Leonard E. Thomas, of Los Angeles, and John M. Schaupp, of Fort Dodge, Iowa, for appellants.

John J. Goldberg, of San Francisco, and George L. Greer, of Los Angeles, for respondent United Airports Co., of California, Ltd.

YORK, Presiding Justice.

Appellants request permission to file a consolidated supplemental clerk's transcript of amendments made during the trial to the complaint herein to conform to proof, leave therefor having been granted by the trial judge at the close of trial on December 27, 1938, over the objection of the respondent United Airports Company.

From the affidavits filed in this court addressed to the application or request, as well as from the record on appeal, it appears that on July 7, 1939, when the transcripts in the instant causes were called for settlement the following minute order was made:

"Settlement of Clerk's and Reporter's Transcripts on Appeal came on for hearing, being continued from July 5, 1939,—T. G. Cecil, Reporter—2:10 P. M. to 3:15 P. M. Leonard E. Thomas appearing for plaintiff in both cases; Elber H. Tilson appearing for defendant Western Air Express Corporation in both cases; George L. Greer and John J. Goldberg appearing for defendant United Airports Company of California, Limited, in both cases. The Court orders written Amendments to conform to proof in each case filed nunc pro tunc as of December 27, 1938. Argument on the settlement of the transcripts is concluded and the Court informs the attorneys the transcripts will be signed when corrections are made." Accordingly, the amendments were filed and stamped on the back, to-wit: "July 7, 1939. Filed nunc pro tunc as of December 27, 1938. L. E. Lampton, County Clerk, By C. D. Wier, Deputy."

It further appears that on said July 7, 1939, the regular clerk of the court was ab-

sent on vacation and that, through inadvertence and error on the part of the substitute clerk of said court, the original clerk's transcripts were never sent to the county clerk's office for the purpose of having the corrections made as ordered by the trial court, and the said transcripts were transmitted to this court without the amendments to conform to proof having been incorporated therein.

The purpose of the amendments to conform to proof was to add at a designated place in each complaint the following allegation:

"That with the approval of the Department of Commerce and with the consent of Western Air Express Corporation and other public air carrier corporations operating in and out of Union Air Terminal, defendant United Airports Company of California, Ltd., agreed with said carriers to control, and did control, such aircraft in the area surrounding said airport operated by it and as specified in said agreement, and agreed to supply a radio localizer beam to such aircraft for instrument approaches to said airport at such times as the same were ~~needed or~~ requested"; as well as the addition at certain designated places in said complaints of the following words: "and the said defendant United Airports Company of California, Ltd., its agents, servants and employees."

Respondent United Airports Company opposes the filing of said transcript upon the following grounds: "1. That the affidavit of Leonard E. Thomas in support of the application does not show excusable neglect in the failure of appellants until November 27, 1939, to take any proceedings for the inclusion in the clerk's transcript of said amendments to complaints. * * * 2. That the granting of appellants' application * * * would operate prejudicially to respondent United Airports Company of California, Ltd. Affiant (John J. Goldberg) prepared the brief for that respondent on the basis of the record on appeal as it stood at the time appellants' opening brief was filed and at the time the brief for said respondent was in preparation * * * that appellants are not entitled to such consideration and to have this respondent put to the further expense and effort of preparing a supplemental brief in view of the long delay and inexcusable failure of appellants to follow the requirement of the trial court and to note the absence in the clerk's transcript of the proffered amendments to complaints."

So far as is ascertainable from a cursory reading thereof, no mention is made in appellants' opening brief herein of the amendments to conform to proof, but respondent United Airports' reply brief filed on November 15, 1939, calls attention to their omission as follows: "Whether through inadvertence or because appellants did not choose to amend according to the proof as determined by the court, no formal amendment to conform to proof was ever filed in the cases or made a part of the record on appeal. We must assume therefore that appellants decided to stand on the complaints as filed and as to which United Airports had made timely objection before the trial commenced."

Immediately thereafter, to-wit, on November 27, 1939, counsel for appellants filed his affidavit in support of his application for permission to file said consolidated supplemental clerk's transcript containing the amendments to the complaints, and on December 6, 1939, served and filed his notice of hearing on December 18, 1939, before this court of respondent's objections to said application.

[1] In the circumstances, it must be conceded that appellants' opening brief was prepared upon the assumption that the amendments to conform to proof were included in the record on appeal, and that their omission was first discovered by counsel for respondent United Airports Company. While greater care undoubtedly should have been exercised by counsel in checking the transcripts before filing their opening brief on appeal, it has become so natural for both litigants and attorneys to rely upon the efficiency and accuracy of the attaches of the county clerk's office, that it seems unfair to say that appellants' failure in this regard is entirely inexcusable. Counsel for respondent United Airports Company had personal knowledge throughout the proceedings in the trial court, as well as those incident to this appeal, that appellants desired to include in the clerk's transcript the amendments to conform to proof, and were also advised that the trial court had granted appellants' request therefor. Had said counsel upon discovery of the omission seen fit to disclose the same before filing their reply brief, much time and wasted effort could have been saved for all concerned.

[2] "Appellate courts look with favor upon an amendment the effect of which is to enable them to review the decision of the lower court in view of all the facts which

that court had before it when it made its decision. McMahon v. Hamilton [202 Cal. 319, 325, 260 P. 793], supra." Webster v. Webster, 216 Cal. 485, 492, 14 P.2d 522, 524.

It is obvious that respondent United Airports Company will suffer no prejudice by reason of the diminution of the record here sought, and permission is hereby given to said respondent to file a supplemental reply brief, if it desires to do so.

The application of appellants to file the consolidated supplemental clerk's transcript containing the amendments to conform to proof is therefore granted.

We concur: DORAN, J.; WHITE, J.




38 Cal.App.2d 50

**CLOUGH v. BABER et al. (PUEBLO TRADING CO. et al., Interveners).**

**Civ. 6309.**

District Court of Appeal, Third District, California.

March 18, 1940.

As Modified on Denial of Rehearing April 17, 1940.

Hearing Denied May 16, 1940.

**1. Mandamus ⇐110**

Mandamus is the proper remedy to compel board of directors of irrigation district to pay the owner of matured bonds and interest-bearing coupons, from available funds, the amount to which he is entitled.

**2. Constitutional law ⇐46(1)**
**Mandamus ⇐172**

In ascertaining the official duties of the board of directors of irrigation district or its officers, in mandamus action, the court may construe a statute necessarily involved or determine its constitutionality.

**3. Mandamus ⇐1, 7**

Mandamus is an extraordinary remedy, equitable in its nature, and there is no absolute right to the writ.

**4. Mandamus ⇐1, 15**

The necessity of issuing mandamus must be clearly established, and the writ will not issue in doubtful cases, or if it would result in grievous public or private wrong in conflict with spirit of the statute, even though it be in compliance with the technical letter of the law.

**5. Waters and water courses ⇐230(6)**

Where irrigation district was insolvent, lands had been conveyed to the state, district's taxing power was entirely exhausted, and large amount of matured bonds were unpaid, bonds should not be paid in the order of registration, so as to create preference over subsequently registered bonds, but available funds should be apportioned pro rata among the holders of all valid claims, notwithstanding rule allowing preference in order of payment where it will be possible to pay all bonds. Gen.Laws 1931, Act 3854, §§ 52, 61a.

---

Mandamus action by George A. Clough against W. C. Baber, and others, directors of the Compton-Delevan Irrigation District, and others, to compel payment of bonds and coupons, wherein the Pueblo Trading Company and others intervened.

Petition denied.

Geo. A. Clough, of San Francisco, in pro. per.

Hudson Ford, of Colusa, and Elmer Laine, of Willows, for respondents.

W. Coburn Cook, of Turlock, for interveners.

Harry W. Horton, of El Centro, A. L. Cowell, of Stockton, Hankins & Hankins, of San Francisco, Thomas C. Boone, of Modesto, C. F. Metteer, of Sacramento, Arvin B. Shaw, Jr., of Los Angeles, and Stephen W. Downey, of Sacramento, amici curiae for intervener Irrigation Districts Assn. of California.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel an irrigation district to pay certain matured and registered bonds and interest-bearing coupons from the limited funds on hand. The chief opposition to the payment of the bonds and coupons is that the district is insolvent and therefore unable to meet its obligations. It is asserted the payment of those bonds and coupons will constitute an unjust preference since the lands in the district have all been sold for delinquent assessments; that the power of the district to meet its indebtedness by assessments or otherwise has been completely exhausted and all other bondholders and creditors will then be without recourse to any funds or means of satisfying their claims.

The sole question to be determined on this proceeding is whether the matured bonds of the district, under the circumstances of this case, should be paid in the order in which they were registered or whether the money on hand should be apportioned pro rata among all of the bondholders upon an equitable basis.

The respondent, Compton-Delevan Irrigation District, was organized pursuant to law, by landowners in Colusa county, in 1920. Bonds were issued by the district in the aggregate sum of $575,000, consisting of 575 bonds of the par value of $1,000 each, to each of which bonds there was attached interest-bearing coupons payable semi-annually at the rate of 6 per cent per year. In 1927, 523 of those bonds were still outstanding and unpaid. At that time the bonded indebtedness of the district was renewed by voting and issuing refunding bonds in the aggregate amount of 523,000. January 1, 1932, there were outstanding and unpaid 281 of those refunding bonds, together with the interest-bearing coupons attached thereto. No bonds or coupons have been paid since that date. All of the lands of the district have been sold and conveyed to the state for delinquent assessments. January 1, 1939, the district had in its treasury the sum of $32,000. By resolution duly adopted, $15,000 of that sum was set apart for the purpose of paying matured bonds and coupons. An average of $5,000 was received annually by the district in the years of 1935 to 1938 inclusive from rent paid for the leasing of portions of the land, which is insufficient with which to pay the necessary expenses of operating the district and the accumulated interest on its indebtedness.

The petitioner owns five bonds of the denomination of $1,000 each, together with interest-bearing coupons which were matured and unpaid on January 1, 1932. These bonds and coupons were duly registered for payment with the treasurer on the following day. No other bonds were previously registered by any of their owners. Other bonds were, however, subsequently registered. Demand for the payment of said five bonds and coupons from the funds on hand was refused. The petitioner is the owner of 34 other bonds of the denomination of $1,000 each, which were not matured at the time of registering said five bonds.

The respondents' answer alleges that all of the land in the district has been foreclosed for delinquent assessments and sold to the state; that there is no property in the district upon which assessments to pay for operating expenses or the obligations of the district may be levied; that the bonded indebtedness of the district on July 1, 1939, was $588,541.65; that the district is without resources or means with which to pay the obligations and it is therefore insolvent. It is conceded the district is insolvent.

The interveners own 24 original and refunding bonds of the par value of $1,000 each, together with the interest-bearing coupons thereof all of which have been presented for payment since the registration of petitioner's bonds, and no part of which have been paid. The interveners support the petition for a writ of mandamus and contend that the bonds and coupons should be paid in the order in which they are presented for payment and registered.

[1-4] Mandamus is the proper remedy to compel a board of directors of an irrigation district to pay, from available funds, the owner of matured bonds and interest-bearing coupons the amount to which he is entitled. Hutchison v. Reclamation District No. 1619, 81 Cal.App. 427, 254 P. 606; 16 Cal.Jur. 814, sec. 31. In ascertaining the official duties of the board or its officer, the court may construe a statute necessarily involved or determine its constitutionality. 16 Cal.Jur. 871, secs. 69, 70. Mandamus, however, is an extraordinary remedy which is equitable in its nature. There is no absolute right to the writ. The necessity of issuing the writ must be clearly established. It will not issue in doubtful cases. It will not issue if the writ would result in grievous public or private wrong in conflict with the spirit of the statute, even though it be in compliance with the technical letter of the law. Duncan Townsite Co. v. Lane, 245 U.S. 308, 38 S.Ct. 99, 62 L.Ed 309; Hutchison v. Reclamation District, supra; High's Extraordinary Legal Remedies, 3d Ed., 12 sec. 9; 16 Cal.Jur. 776, secs. 13, 14.

[5] In support of petitioner's contention that he is entitled to full payment of his five registered bonds and the attached coupons from the fund of $15,000 on hand, on the doctrine of "first come, first served" or the absolute right to payment in the order in which the bonds are registered with the treasurer of the board, he relies upon the interpretation of sections 52 and 61a of the Irrigation District Act of California (Stats. 1897, p. 254, and amendments, 2 Deering's Gen.Laws of 1931 p. 1948, Act 3854), as

construed in the following cases. Bates v. McHenry, 123 Cal.App. 81, 10 P.2d 1038; Provident Land Corp. v. Zumwalt, 12 Cal.2d 365, 85 P.2d 116; Moody v. Provident Irrigation District, 12 Cal.2d 389, 85 P.2d 128.

In none of those cases was the application of sections 52 and 61a of the act involved under circumstances like those of the present proceeding where the district is insolvent and the fund on hand is inadequate to pay more than a small percentage of the matured bonds and obligations of the district, and where all of the lands of the district have been sold and conveyed to the state for delinquent assessments, thereby exhausting all available means of levying future taxes to pay the bondholders. In those cases there was no showing of the injustice of directing the payment of registered bonds so as to deprive all other bondholders of the possibility of ever recovering any substantial portion of their investments therein.

Section 52 of the act does not declare that matured bonds shall be paid in the order in which they are registered. All that it provides is that when there is no money available in the bond fund they may be presented to the treasurer and registered for payment after which they will bear 7 per cent interest per annum "until notice is given that funds are available" for that purpose. The section then declares that: "It [the bond] shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation."

Section 61a of the act prescribes the procedure to be followed as evidence of the added burden of interest with respect to warrants which are presented when there is no money in the fund with which to pay them. That section does not specify that such warrants shall be paid in the order in which they are presented. That fact may be inferred under proper circumstances, as the preceding cases upon which the petitioner relies, hold. There is no mandatory language in that section requiring them to be paid in the order in which they are registered. In an equitable proceeding, like the present petition for a writ of mandamus, certainly no reasonable construction of that section would require payment of such warrants or bonds under the circumstances of this case. Section 61a is clearly intended to provide for allowance of interest after claims are presented, during the time payment is delayed on account of a lack of funds. It was not adopted to prescribe the order in which registered bonds or warrants are required to be paid. The only language from which that requirement may be inferred in proper cases consists of the following statement: "When funds of the district are not available to pay the same, the treasurer of the district shall indorse thereon the words 'funds not available for payment', with the date of presentation and shall specify the interest that such warrants shall thereafter bear and shall sign his name thereto. He shall keep a record showing the number and amount of each such warrant, the date of its issuance, the person in whose favor it was issued, and the date of its presentation for payment."

That section then provides that when there are sufficient funds with which to pay the outstanding registered warrants, the treasurer shall give notice by publication or posting to that effect. After the time fixed by that notice has expired the interest ceases to become a charge against the district. Nowhere in that section, or elsewhere in the act, is it provided that bonds or warrants shall be paid in the order in which they are presented for payment. The section concludes by stating that: "All warrants for the payment of which funds are declared in said notice to be available shall cease to draw interest at the time of the first publication or posting of said notice."

We conclude that such cases as Bates v. McHenry, supra, should be construed to determine only that bonds or coupons shall be paid in the order in which they are registered when there is money in the fund or a prospect of securing such necessary funds by taxation of the land or otherwise sufficient to meet the obligations of the district. A construction of those cases should not obtain which will absolutely impair or destroy the obligations of the contracts to pay other bonds or coupons by distributing to those who have first registered their bonds all of the funds which the district will ever be able to raise. That sort of a preference would do violence to the fundamental principles of justice and equity.

While the exact situation which is involved in this proceeding has not been previously determined in this state, the courts have clearly intimated that when an irrigation district or a reclamation district is insolvent and its ability to raise funds to pay existing obligations by taxation has been entirely exhausted, a fund which is inadequate to meet the obligations of the district will not be distributed to the bondholders in the

order in which they have been registered. On the contrary, the money, under such circumstances, should be pro rated equitably among all of those who have valid claims therefor regardless of the time of their registration. Kerr Mfg. Corp. v. City of San BuenaVentura, 7 Cal.2d 701, 62 P.2d 583; Provident Land Corp. v. Zumwalt, supra; Mulcahy v. Baldwin, 216 Cal. 517, 15 P.2d 738; Rohwer v. Gibson, 126 Cal.App. 707, 14 P.2d 1051; Morris v. Gibson, 30 Cal. App.2d 684, 87 P.2d 37; Morris, Mather & Co. v. Port of Astoria, 141 Or. 251, 15 P.2d 385, 390; State v. Knott, 129 Fla. 136, 176 So. 113; 6 McQuillin's Munic. Corp., [2d ed.] 245, sec. 2504; 1 Pomeroy's Eq. Jur., 4th Ed., 764, sec. 407. The preceding authorities recognize the principle that where the debtor is insolvent and there is not sufficient funds with which to pay all obligations in full and the power to raise funds by taxation or otherwise has been exhausted, in accordance with the settled doctrine of equity the accessible money should be pro rated among the holders of all valid claims.

In the present case the district is insolvent; the lands have all been conveyed to the state on account of default of assessments; matured bonds in the aggregate sum of $283,000 are unpaid, many of which have been registered subsequent to petitioner's bonds; the rented lands fail to produce sufficient income to pay operating expenses and accruing interest to meet the debts of the district; the taxing power of the district has been entirely exhausted; there is no prospect of raising further funds in any manner whatever, with which to meet present and future obligations of the district. Under such circumstances the petitioner is not entitled to payment in full of his five registered bonds as a preference, but the available funds should be apportioned pro rata among the holders of all valid claims.

In support of the application of the preceding equitable principle of pro rating funds among creditors of a city or district when it is insolvent and its taxing power for payment of such claims has been exhausted, and the money on hand is inadequate, the Supreme Court, at page 709 of 7 Cal.2d, at page 587 of 62 P.2d of the Kerr Glass Manufacturing case, supra, approved the conclusions reached in the case of Meyer v. Widber, 126 Cal. 252, 58 P. 532, in the following language:

"It was thereupon concluded that, where the sources of the bond redemption fund were so limited and were not fortified by the authority to resort to a general or 'inexhaustible' taxing power, the fund becomes a trust fund to be shared by all who hold claims against it without priority one over the other. Thus it was appropriately held that, where such a fund was insufficient to pay in full all who had claims against it, the petitioner was entitled only to share ratably with the other bondholders. * * *

"As in the act involved in the case of Rohwer v. Gibson, supra, there is no provision in the Improvement Bond Act which can be interpreted to inhibit the settlement of the claims of all bondholders ratably when the necessity requires. The language in section 3 above quoted and relied upon by the petitioner, unaccompanied by any provisions which would give it a mandatory character, must be deemed to be directory only. In Meyers v. City of Idaho Falls, supra 52 Idaho 81, 11 P.(2d) 626, a provision for payment in numerical order was held to be directory only and not to prevent the distribution of the moneys as a trust fund. Pursuant to direction for payment upon presentation, if it were possible for all bonds remaining unpaid to be presented simultaneously, the treasurer would find himself compelled to divide an insufficient fund ratably among all so presenting. The same duty arises to divide the funds ratably when it appears that there will not be sufficient to pay all bonds in full, whether or not all are technically presented for payment. No contention is made by the petitioner that there does not in fact exist an insufficiency resulting by virtue of the large percentage of delinquencies and the consequent inability of the city to realize from all available sources sufficient to pay all bonds in full from the redemption fund. * * * In such a case it may restrict payments from the bond redemption fund on a pro rata basis among the holders of all bonds remaining unpaid, whether or not the same have matured."

The other authorities previously cited by us in support of the doctrine of pro rating funds among all creditors when the district is insolvent and its taxing power has been exhausted, either directly or by necessary inference, adopt that rule. They merely announce the just and equitable principle which should prevail under such circumstances.

The petition for a writ of mandamus is denied.

We concur: PULLEN, P. J; TUTTLE, J.

38 Cal.App.2d 64

**YOUNG v. CRAMER et al.**

**Civ. 2514.**

**District Court of Appeal, Fourth District, California.**

**March 19, 1940.**

**Hearing Denied May 16, 1940.**

**1. Covenants ⇐77**

**Building restrictions and conditions in deeds can be enforced only by owner of part of land for benefit of which they were created, especially where deeds conveying all lots in tract each contain restrictions and conditions clearly set forth as relating to adjoining lots and imposed for specific purpose of benefiting all lots therein.**

**2. Covenants ⇐77**

**The right of beneficiary under subdivision trust in bank, which conveyed its right of re-entry on lots in subdivision to beneficiaries after conveying all of them by deeds containing building restrictions, to recover judgment declaring that title to lots had reverted to him because of violation of such restrictions, is not strictly "estate in reversion" or "personal covenant" of which he may take advantage, but "equitable easement or servitude", created for benefit of other lots in tract and their owners, and he acquired no right by such conveyance to maintain action for such judgment, where he owned no portion of land for benefit of which restrictions were made.**

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Easement or Servitude," "Estate in Reversion" and "Personal Covenant".

**3. Covenants ⇐77**

**The provisions of subdivision trustee's deed, conveying trustee's right of re-entry on lots in subdivision to trust beneficiaries after trustee's conveyance of all such lots by deeds containing building restrictions, should be read as whole, in determining whether a beneficiary acquired right to have title to such lots reverted to him because of breach of such restrictions.**

---

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by William F. Young against Newton E. Cramer and others for a judgment declaring that title to certain realty had reverted to plaintiff because of defendants' breach of restrictions and conditions in a deed conveying realty to their predecessor. Judgment for defendants, and plaintiff appeals.

Affirmed.

Phillips & Thompson, of Los Angeles (L. H. Phillips and Henry N. Cowan, both of Los Angeles, of counsel), for appellant.

O'Melveny, Tuller & Myers, of Los Angeles (Marshall Taylor, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, of counsel), for respondents.

BARNARD, Presiding Justice.

In this action the appellant sought a judgment declaring that the title to certain real property had reverted to him because of the breaching of the restrictions and conditions set forth in a deed by which the property had been conveyed to a predecessor of the respondents.

The appellant was originally a beneficiary under a subdivision trust in which a bank was the trustee. All of the lots in the subdivision were sold and all were conveyed by the trustee through deeds containing the restrictions, conditions and provisions here in question. The respondents' predecessor purchased two of the lots and later later conveyed them to the respondents. After all of the lots were sold the trustee bank conveyed its right of re-entry to the beneficiaries of the subdivision trust in proportion to their respective interests in the trust. The appellant, claiming a violation of certain building restrictions, sought a judgment declaring that the title to these two lots had reverted to him, although he holds only an undivided 550/1000ths interest in said right of re-entry and the holders of the other fractional interests in said right of re-entry have refused to join him in the prosecution of the action.

The complaint alleged that all lots in the tract were conveyed by deeds containing certain building restrictions, which are set forth, and also containing the following provisions:

"Provided, further, That a breach of the foregoing conditions and restrictions shall cause said premises to revert to the grantor, its successors or assigns, each of whom respectively shall have the right of reentry immediately upon said premises in the event of any such breach; and as to the owner of any other lot in said Tract, the foregoing restrictions and conditions shall operate as

covenants running with the land, and a breach of any such covenants or continuance of any such breach may be enjoined, abated, or remedied by appropriate proceeding by such grantor, its successors or assigns, or by any such owners, their heirs, devisees, executors, administrators, successors or assigns, but by no other person. * * *

"It is understood and agreed that the foregoing conditions and restrictions are a part of a general plan for the improvement of Tract 4642, which plan contemplates that all of the lots in said Tract shall be used for residence purposes only, except as hereinabove specifically provided, and that said conditions and restrictions are for the benefit of said Tract, and each and every parcel of land therein, and shall inure to and pass with said Tract, and each and every parcel of land therein, and are hereby imposed upon the premises covered by this conveyance as a servitude in favor of said Tract, and each and every parcel of land therein as the dominant tenement or tenements."

The complaint further alleged "that the sole purpose for such restrictions was to benefit the subdivision as aforesaid as a whole and each and every lot thereof", and "that the existence of such restrictions on each and every lot in said subdivision was used as an inducement to each and every buyer and that the price of each lot was increased by reason of the restrictions on each and every other lot".

The respondents interposed general and special demurrers to the complaint which were sustained without leave to amend. It is conceded that the appellant is unable to allege that he is the owner of any land within this subdivision and the question presented on this appeal from the judgment is whether a cause of action was stated in the absence of such an allegation.

The appellant contends that the deed to the lots in question, which passed from his predecessor to the predecessor of the respondents, contained the reservation of a right of reversion; that this constituted a part of the estate which was not conveyed; and that he has acquired this interest, which is sufficient to enable him to maintain this action although he owns no property in the subdivision. In passing upon a similar contention the Supreme Court, in Parry v. Berkeley, etc., Foundation, 10 Cal.2d 422, 74 P.2d 738, 740, 114 A.L.R. 562, said: "A more accurate analysis of the interests involved discloses that when the grantor conveys the fee simple on condition subsequent, he has no actual estate remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right of power to terminate the estate of the grantee and retake the same, if there is a breach of condition."

In Werner v. Graham, 181 Cal. 174, 183 P. 945, 947, the court said: "The enforcement of covenants restricting the use of one parcel of land for the benefit of another parcel, not merely as between the original parties, but as between their respective grantees, between whom no privity of estate or of contract can properly be said to exist, originated at a comparatively recent date in the chancery courts, and apparently without a clear appreciation of the fact that the enforcement of such covenants for and against grantees of the original parties was, in effect, the creating of servitudes. Such servitudes are frequently spoken of as 'equitable easements.' They were unknown to the common law and are not among the servitudes enumerated by our Code. Sections 801 and 802 Civ.Code. They are opposed to the rule that the owner of land may not create new and heretofore unknown estates, and while their validity—that is, the enforceable character of such covenants as against grantees of the original parties—is now too well established to admit of question, it has resulted that the covenants which will be so enforced are limited to those which directly concern and benefit what we may term the dominant tenement, and also that any provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land."

In Firth v. Marovich, 160 Cal. 257, 116 P. 729, 731, Ann.Cas.1912D, 1190, it is said: "It is not open to question that building restrictions of the kind contained in the deed from plaintiff to Scherer are valid and enforceable at the suit of the grantor, so long as he continues to own any part of the tract for the benefit of which the restrictions were exacted." In Los Angeles University v. Swarth, 9 Cir., 107 F. 798, 806, 54 L.R.A. 262, the court said: "But

the complainants do not show in their bill, and it is not shown by affidavit or otherwise, that they are now the owners of or have any interest in any lands in the vicinity of the university buildings or the campus connected therewith, but, on the contrary, it is averred upon information and belief, in one of the affidavits, that the complainants have no such interest. The inference is, therefore, that the complainants are not in any way interested in the benefit arising from the restriction or limitation placed upon the granted estate by the terms of the covenant contained in the deed, and that the complainants will not be damaged by the failure of the defendants to comply with the terms of the covenant. They are therefore not in a position to maintain this action."

In that case, in commenting upon the case of Graves v. Deterling, 120 N.Y. 447, 24 N.E. 655, the court further said: "In the last case cited, the complainants failing to show such an interest, the complaint was dismissed upon the ground that the complainants had no right or interest upon which an action could be founded. And in reason and principle this must be the rule upon the subject. In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property; but, where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced in favor of the title to such adjoining property."

[1] While the decisions in other states upon the question now before us are in conflict, it is recognized by the law writers that the majority view is to the effect that such restrictions and conditions as those now before us can be enforced only by the owner of a part of the land for the benefit of which the restrictions and conditions were created. Among the cases supporting this view are Sanborn v. Rice, 129 Mass. 387; Stevens v. Galveston, H. & S. A. Ry. Co., Tex.Com.App., 212 S.W. 639; Merrifield v. Cobleigh, 4 Cush. 178, 58 Mass. 178; Crocker v. Ingersoll Engineering & Construction Co., 6 Cir., 249 F. 31; Barrie v. Smith, 47 Mich. 130, 10 N.W. 168; Maddox v. Adair, Tex.Civ.App., 66 S.W. 811; Davis v. Skipper, 125 Tex. 364, 83 S.W.2d 318.

It is particularly appropriate that this view should be adopted under the facts of this case where the deeds conveying all of the lots in this tract each contained restrictions, conditions and provisions which are so clearly and definitely set forth as relating to the adjoining lots in the tract, and as being imposed for the specific purpose of benefiting all of the lots in that tract. The deeds provided that all of the conditions and restrictions are a part of a general plan for the improvement of the tract as a whole, that they are for the benefit of the tract and every parcel of land therein, that they shall inure to and pass with the tract and each parcel thereof, and that they are imposed upon the particular lot as a servitude in favor of the whole tract and each part thereof as the dominant tenement. It is further definitely alleged that the existence of such restrictions was used as an inducement to each buyer of a lot, that the price of each lot was increased by reason thereof, and that the sole purpose of such restrictions was to benefit the subdivision as a whole and each and every lot thereof.

[2, 3] We think it clearly appears that the right to which the appellant lays claim is not strictly an estate in reversion and that it is not a personal covenant of which he may take advantage. It is an equitable easement or servitude created for the benefit of other lots in the tract and their owners. In so far as here appears there was nothing for the trustee bank to convey to the appellant and he acquired nothing by that conveyance which would enable him to maintain this action, in the absence of the ownership of a portion of the land for the benefit of which the restrictions, conditions and provisions were made. The provisions of the deed should be read as a whole and, so taken, they disclose that the right given to the grantor to have the title reverted upon the breach of the conditions was given to the grantor as an owner of land in the tract and not personally, and it must be held that the exercise of such a right is dependent upon the continuance of ownership of some part of the tract, the benefit of which was the sole purpose of the entire agreement.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

## HILL, Public Administrator, et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.*

Civ. 11376.

District Court of Appeal, First District, Division 2, California.

March 16, 1940.

Hearing Granted May 13, 1940.

1. **Attachment** ⇐7

An alleged cause of action by special administrator against former executor for conversion of assets of estate would not support the issuance of a writ of attachment. Code Civ.Proc. § 537.

2. **Courts** ⇐475(2)

A suit for an accounting by special administrator against former executor whose account was not settled by probate court would not lie, since probate court had exclusive jurisdiction to settle account of former executor.

3. **Executors and administrators** ⇐473(1)

An alleged cause of action for money had and received by special administrator against former executor was prematurely brought, where the account of the executor had not yet been settled by the probate court.

4. **Courts** ⇐476

Where the account of former executor had not yet been settled by probate court, trial court would not act in excess of jurisdiction by discharging a writ of attachment issued in an action alleging cause of action for conversion of assets of estate, assumpsit for money had and received, and for an accounting. Code Civ.Proc. § 537.

5. **Courts** ⇐475(2)

Former executor's admission of some indebtedness to estate and that he would secure repayment of such sums could not oust probate court of its exclusive jurisdiction to settle account of former executor so as to confer jurisdiction upon superior court to entertain an independent action for alleged indebtedness prior to the settlement of the account by the probate court, since determination of amount of indebtedness in two separate proceedings would result in confusion.

6. **Executors and administrators** ⇐473(1)

The statute providing for an action by the executor or administrator of an estate against a person who embezzles, conceals, smuggles or fraudulently disposes of any property of a deceased did not authorize bringing of an independent action against former executor for conversion of assets of estate, assumpsit for money had and received, and for an accounting, prior to the settlement of his account by the probate court. Probate Code, §§ 524, 612, 923, 932.

---

Prohibition proceeding by Albert E. Hill, as Public Administrator of the county of Alameda, state of California, and as special administrator of the estate of W. F. Gibbard, also known as William Frederick Gibbard, and also known as William F. Gibbard, deceased, against the Superior Court of the State of California, in and for the County of Alameda, and Honorable T. W. Harris, as Judge thereof.

Writ denied.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Owen Hotle, Jr., Deputy Dist. Atty., all of Oakland, for petitioner.

A. J. Woolsey and Walter V. Cairns, both of Oakland, for respondents.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from entering an order discharging an attachment in an action in which petitioner is plaintiff and H. S. Craig is defendant.

There is no dispute concerning the essential facts. Said H. S. Craig was appointed in 1935 as the executor of the last will and testament of W. F. Gibbard, deceased, and continued to act as such until his letters testamentary were revoked on December 4, 1939. Petitioner was thereupon appointed as special administrator and was later appointed as administrator with the will annexed of the estate of said deceased. On December 7, 1939, petitioner instituted the above-mentioned action against defendant H. S. Craig, being action numbered 155937 in the files of the superior court in the county of Alameda. On December 11, 1939, said H. S. Craig filed his account in the probate proceeding and the matter of the settlement of said account is still pending and undetermined. The petition shows that said action, instituted by petitioner against said H. S. Craig, was one in which the complaint alleged "a cause of action in tort for damages for the conversion of the assets of

*For subsequent opinion see 106 P.2d 876.

the estate, a cause of action in assumpsit for money had and received for the use and benefit of the estate, and a cause of action for an accounting". Upon the filing of said action, plaintiff caused a writ of attachment to be issued and levied. On December 28, 1939, a motion was made to discharge said attachment upon the ground that the action was prematurely brought and that no cause of action existed or could exist until the account of said H. S. Craig has been settled by the probate court. A hearing was had and the matter was continued for further hearing, the trial court indicating its intention to grant said motion at the following hearing. Thereupon this proceeding was commenced.

[1-4] Petitioner contends that the trial court was threatening to act in excess of its jurisdiction in discharging said attachment but we find no merit in this contention. The alleged cause of action for conversion would not support the issuance of the writ of attachment (Code Civ.Proc. sec. 537); the probate court had exclusive jurisdiction to settle the account of the former executor and no independent action in equity would lie to obtain an accounting (King v. Chase, 159 Cal. 420, 115 P. 207); and the alleged cause of action for money had and received was prematurely brought as the account of the executor had not as yet been settled by the probate court. Turney v. Shattuck, 96 Cal.App. 590, 274 P. 442.

The respective parties seem to be agreed that the question involved is whether the rule of Turney v. Shattuck, supra, is applicable to the action here brought by petitioner against the former executor. We see no escape from the conclusion that said rule is applicable. Petitioner calls our attention to the amended complaint which was filed in said action. In the original complaint, plaintiff alleged in the first count the conversion by defendant of property of the estate to the damage of the estate in the sum of $78,000. In the second count, plaintiff alleged that defendant had and received $95,000 for the benefit of the estate and that no part thereof had been paid except the sum of about $17,000. In the third count, plaintiff alleged that defendant had appropriated money and property of the estate, the full amount of which was unknown and could only be ascertained by an accounting. Plaintiff prayed for judgment for $78,000 and interest and for an accounting. In the amended complaint, plaintiff added certain allegations to those found in the first count of the original complaint. The new allegations showed that in May, 1939, defendant made a written statement, which is set forth in full and from which it appears that defendant had made unauthorized loans to third persons of the money of the estate to the amount of $67,955.56. He stated therein that, "I feel personally responsible for the entire sum which I loaned from the estate funds and I shall do everything humanly possible to secure the moneys to repay the full amount loaned from the estate." It was further alleged that in November, 1939, defendant confessed to the district attorney that he had unlawfully converted "the sum of more than $70,000" from said estate and it was also alleged that he had subsequently testified before the grand jury to the same effect. The remaining counts of the amended complaint were similar to those found in the original complaint with the addition of further counts attempting to declare upon the written statement above referred to as a "contract in writing". The prayer of the amended complaint was similar to that found in the original complaint.

[5] It seems entirely clear from the admitted facts that nothing short of a full accounting can settle the question of the amount of the former executor's indebtedness to the estate. We are of the opinion that the fact that the former executor admitted some indebtedness is of no significance in determining the question before us as neither the acts nor agreements of the former executor or the present administrator could oust the probate court of its exclusive jurisdiction to settle the account of the former executor or confer jurisdiction upon the superior court to entertain an independent action for the alleged indebtedness prior to the settlement of said account by the probate court. The confusion which would result from permitting the determination of the amount of the indebtedness in two separate and independent proceedings is obvious and the rule of Turney v. Shattuck, supra, is a salutary one designed to avoid such confusion. In that case it appears that the judgment in the independent action was withheld until after the settlement of the account by the probate court and the filing of a supplemental complaint but it was nevertheless determined that the

judgment could not be sustained as the action had been brought at a time when the court had no jurisdiction to entertain it.

[6] Petitioner also cites section 612 of the Probate Code providing for an action by the executor or admininstrator of an estate against a person who "embezzles, conceals, smuggles or fraudulently disposes of any property of a decedent". A consideration of the history of this section, the other sections of the Probate Code (see in particular secs. 524, 923 and 932) and the authorities above cited leads us to the conclusion that said section 612 may not be relied upon to justify the bringing of an independent action against the former executor prior to the settlement of his account by the probate court.

We conclude that the admitted facts show that petitioner's action was prematurely brought, at least as to any alleged cause of action which might support the issuance of the writ of attachment, and that the trial court is neither threatening to err nor to exceed its jurisdiction in discharging the attachment.

The alternative writ of prohibition is discharged and the peremptory writ is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.




38 Cal.App.2d 11

## BOURDIEU v. SEABOARD OIL CORPORATION OF DELAWARE, et al.

Civ. 2289.

District Court of Appeal, Fourth District, California.

March 13, 1940.

Rehearing Denied April 12, 1940.

Hearing Denied May 9, 1940.

**1. Limitation of actions ⇐32(1)**

Lessees of mineral rights in public lands withdrawn from settlement by executive order were not "trespassers" in entering and occupying the lands for purpose of removing gas and oil therefrom, and hence homesteader's claim for damage to surface was not barred by three-year limitation applying to liability for trespass upon or injury to real property. Code Civ.Proc. § 338, subd. 2; 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespassers".

**2. Mines and minerals ⇐5**
**Statutes ⇐225**

The federal statutes relating to disposal of surface rights and for leasing of oil and gas deposits of public lands withdrawn from settlement by executive order must be read together, each as the complement of the other, and as so read they disclose an intention to divide oil and gas lands into two estates for purpose of disposal, one including the underlying oil and gas deposits and the other the surface, and to make the latter servient to the former. 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

**3. Limitation of actions ⇐39(13)**

A claim by homesteader against lessees of mineral rights in public lands withdrawn from settlement by executive order for damages caused by lessees entering and occupying a portion of surface for purpose of removing oil and gas therefrom was subject to three-year limitation applying to a "liability created by statute." Code Civ.Proc. § 338, subd. 1; 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Liability Created by Statute".

**4. Mines and minerals ⇐5**

Under federal statute granting lessee of mineral rights in public lands withdrawn from settlement by executive order the appurtenant right to enter and use so much of surface as may reasonably be required for purpose of removing oil and gas therefrom, upon paying damage thereby caused to homesteader, homesteader is not limited to one cause of action by reason of lessee enter-

ing upon and occupying various portions of the land, but rather a new cause of action arises upon the entry and occupancy of additional parcels of the land. Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.

**5. Mines and minerals ⇐5**

Under federal statute granting lessee of mineral rights in public lands withdrawn from settlement by executive order the appurtenant right to enter and use so much of surface as may reasonably be required for purpose of removing oil and gas therefrom, upon paying damages thereby caused to homesteader, the issue of how much of the surface is required ordinarily would be a question of fact determined on trial. Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.

**6. Courts ⇐97(5)**

The state courts are bound by the construction of the federal laws by the federal courts.

**7. Limitation of actions ⇐55(6)**

If entry by lessees of mineral rights in public lands withdrawn from settlement by executive order on the land for purpose of removing oil and gas therefrom were regarded as a permanent trespass, the trespass would relate only to portion of land so entered upon and occupied at the time, and subsequent entries upon unoccupied portion within three years immediately prior to filing action by homesteader for damages to surface would not be barred by limitations. Code Civ.Proc. § 338, subd. 2; Civ.Code, § 3283; 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

**8. Limitation of actions ⇐55(6)**

A homesteader's claim against lessees of mineral rights in public lands withdrawn from settlement by executive order for damages caused by lessees entering and occupying a portion of surface for purpose of removing oil and gas therefrom, based on entries made within three years immediately prior to filing of action, was not barred by limitations, notwithstanding original entry by lessees on homesteader's land was more than three years to filing of action. Code Civ.Proc. § 338, subds. 1, 2; 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

**9. Mines and minerals ⇐5**

Although Congress intended by statutes relating to disposal of surface rights and for leasing of oil and gas deposits of public lands withdrawn from settlement by executive order to encourage the extraction of oil and gas from such lands and permit the United States to receive royalties therefrom, it also intended to protect the homesteader in his limited right to use the surface of the homestead. 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

**10. Mines and minerals ⇐5**

Under federal statutes, lessees of mineral rights in public lands withdrawn from settlement by executive order were entitled only to enter and use so much of surface as might be reasonably required for purpose of removing oil and gas therefrom, and lessees' filling of various gulches and ravines on premises with oil and waste products from wells outside of the land constituted a "continuing trespass" against homesteader's right to use of surface thereof, giving rise to separate and successive causes of action by homesteader for consequential damages. 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Trespass".

**11. Mines and minerals ⇐5**

Proof of an agreement between lessees of mineral rights in public lands withdrawn from settlement by executive order, and occupied by a homesteader and others, for a unit plan of operation would not give lessees the right to use homesteader's lands in any manner or for any purpose not provided in the federal homestead and leasing acts, and lessees would still be liable for all damage caused by additional use of homesteader's land not authorized by statute. 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.

C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.

**12. Evidence ⇐48**

**The courts of California will take judicial notice of the executive acts of the government of the United States. Code Civ. Proc. § 1875, subd. 3.**

**13. Pleading ⇐6**

**In the consideration of a pleading, the courts must read it as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary.**

**14. Mines and minerals ⇐5**

**In action by homesteader of public lands against lessees of mineral rights therein for damages for unlawful entry on land, if lessees gave bond as required by federal statute and if such bond affects the right of recovery of damages, such matters should be pleaded and considered on the trial of the action. 30 U.S.C.A. § 121 et seq.; Mineral Lands Leasing Act Feb. 25, 1920, 30 U.S.C.A. § 181 et seq.; Enlarged Homestead Act Feb. 19, 1909, 43 U.S.C.A. § 218; Stock-Raising Homestead Act Dec. 29, 1916, 43 U.S.C.A. § 291 et seq.**

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Suit by Jean Bourdieu against the Seaboard Oil Corporation of Delaware and others for damages to land held by plaintiff as a homesteader, by defendants as lessees of mining rights of the land. From judgment for defendants, the plaintiff appeals.

Reversed and remanded, with instructions.

Chandler & Wright, of Los Angeles, for appellant.

Frederick D. Anderson and Bertram L. Linz, both of Los Angeles, Morrison, Hohfeld, Foerster, Shuman & Clark and Pillsbury, Madison & Sutro, all of San Francisco, and Dockweiler & Dockweiler and George W. Nilsson, all of Los Angeles, for respondents.

THOMSON, Justice pro tem.

The trial court sustained the defendants' demurrers to each cause of action of the amended complaint without leave to amend; and subsequently denied plaintiff's motion for leave to amend the amended complaint; and thereupon entered judgment "that plaintiff take nothing in the above cause". Plaintiff appealed from this judgment.

A brief résumé of the executive orders and the legislation involved is essential to an understanding of the pleadings herein and the controversy arising therefrom. President Taft, on September 27, 1909, July 2, 1910, December 30, 1910, and on other occasions, by proclamation, withdrew vast areas of public domain from all forms of settlement, entry or disposal under the mineral or nonmineral laws of the United States because much of the public domain containing deposits of coal, oil, gas and other minerals was being taken up under various mineral or homestead laws of the United States for a nominal price, thus depriving the government of large revenues which it would otherwise ultimately receive from such lands. In order to permit the use of the surface of these lands for agricultural and kindred purposes congress enacted a number of surface entry laws, including the act of July 17, 1914 (38 Stats. 509, 30 U.S.C.A. § 121 et seq.), which provided for an agricultural entry, and the Stock-Raising Homestead Act of December 29, 1916 (39 Stats. 862, 43 U.S. C.A. § 291 et seq.), which provided for a stock raising entry. These acts provided that all entries made and patents issued thereunder would be subject to a reservation to the United States of all minerals in the lands, together with the right to prospect for, mine and remove the same and to dispose of the minerals in such lands in accordance with the mineral land laws in force at the time of such disposal. Then followed the Mineral Leasing Act of February 25, 1920 (41 Stats. 437, 30 U.S. C.A. § 181 et seq.), under which qualified persons were permitted to enter upon such lands to prospect for oil and gas and other minerals, and, after discovery, to re-enter such lands under lease from the United States to extract and remove such minerals. Provision is made for the payment of damages to the agricultural homesteader or the stock-raising entryman.

In substance, the amended complaint alleges that plaintiff is the owner of the surface rights to two adjoining parcels of land, each comprising about 320 acres. The first cause of action relates to the north half, and the second cause of action relates to the south half, of section 30,

township 21 south, range 17 east, M. D. B. & M., Fresno county, in the North Dome of Kettleman Hills oil field. The amended complaint alleges that plaintiff acquired the north half of said section by virtue of his application, entry and securing a patent thereon, under the United States Homestead Act of February 19, 1909 (35 Stats. 639, 43 U.S.C.A. § 218), and under the provisions, rights and reservations of the United States Agricultural Entry Act of July 17, 1914, supra; and to the south half of said section by virtue of his entry under the United States Stock-Raising Homestead Act of December 29, 1916, supra. It further alleges that the defendants acquired their rights to the minerals underlying said lands by virtue of leases from the United States under the Mineral Leasing Act of February 25, 1920, supra; that subsequently, against the will of plaintiff and without executing the bond required by said acts, defendants made repeated entries upon plaintiff's homestead, destroyed fences, corrals and sheep runs, and over a period of years drilled and placed on production a number of oil and gas wells on each of said parcels of land, together with the facilities accompanying such wells, including certain structures therein described. The amended complaint sets out in detail the dates of such entries, the dates when the wells were placed on production, and the dates on which the structures and facilities were completed. The first entry and some of the subsequent entries on each of said parcels of land occurred more than three years prior to the filing of this suit. The amended complaint also alleges that, in addition to using said facilities to handle oil and gas produced on said section 30, defendants were and are also using said facilities and structures, against the will of plaintiff, in connection with the handling of oil and gas from other lands distant from said section 30. In his motion to amend the amended complaint, plaintiff sought to amplify this alleged additional use of plaintiff's land by defendants in connection with the handling of oil and gas produced by defendants and others on lands not belonging to plaintiff and located beyond the boundaries of said section 30.

It is one of the contentions of respondents that both causes of action set out in the amended complaint are barred by the statute of limitations, coming within the provisions of either subdivision 1 or subdivision 2 of section 338 of the Code of Civil Procedure, as being an action upon a liability created by statute, or an action for trespass upon or injury to real property. In support of their position respondents urge that the amended complaint discloses that the first entry was made by respondents on the north half of said section 30 on May 11, 1933, and on the south half on September 20, 1931, each being more than three years before the filing of the original complaint, which was on March 30, 1938, and that there is but one cause of action for damages caused by respondents' use of the land and that arises at the time of the first entry under the lease. The portion of the Agricultural Entry Act of July 17, 1914, supra, which is material to this discussion is as follows: "Any person who has acquired from the United States the title to or the right to mine or remove the reserved deposits, * * * may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages." 30 U.S.C.A. § 122. The following provision for damages is contained in the Stock-Raising Act of December 29, 1916, supra: "Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in

a court of competent jurisdiction against the principal and sureties thereon, * * *." 43 U.S.C.A. § 299.

[1-3] It is our conclusion that, in entering and occupying the land under the leases, respondents were not trespassers. Under the statutes providing for such leases, the lessees have not only a right to extract the oil and gas, but also the appurtenant right to enter and to use and occupy so much of the surface of the land as may be required for all purposes reasonably incident to the mining and removal of the oil and gas therefrom; the respondents, as such lessees, being liable, however, for all damage caused thereby to appellant. As pointed out in Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 504, 48 S.Ct. 580, 583, 72 L.Ed. 961, the Surface Entry Act and the Leasing Act are to be read together, each as the complement of the other. "So read they disclose an intention to divide oil and gas lands into two estates for the purposes of disposal—one including the underlying oil and gas deposits and the other the surface—and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values." By the statutes a servitude is placed upon the surface estate for the benefit of the mineral estate, but the obligation is placed upon the holder of the dominant estate, upon entering and occupying any portion of the surface, to pay the owner of the servient estate the damages caused thereby. This liability, we believe, is clearly a liability created by statute. County of Calaveras v. Poe, 167 Cal. 519, 522, 140 P. 23; Raymond v. Christian, 24 Cal.App.2d 92, 113, 74 P.2d 536.

[4, 5] We do not believe, however, that only one cause of action arose by reason of the lessees' entering upon and occupying various portions of the land. Raymond v. Christian, supra. The amended complaint discloses that some of the wells were begun and carried to completion at different times within three years immediately prior to the filing of this action. The statutes permitting lessees to enter upon the land provide that a lessee "may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom". More than 640 acres of land are involved in this action. To drill the first well under such reentry and place it on production probably required the occupation of only a few acres, and the remainder could be used by appellant for his farming and sheep raising. Appellant was not in a position to know at that time how much of the surface would be necessary for the operations of respondents in carrying out the terms of their leases. Even on so-called "known structures" the drilling of oil or gas wells is a hazardous and speculative industry. When the first entry is made on a section of land under such a government lease there can be no certainty as to how much of that section will produce oil or gas in commercial quantities. We think it would be a strained and unwarranted construction of the statutes to require a homesteader, under such circumstances, to anticipate how much of his homestead the lessees contemplate occupying. The lessees could not be required to pay him damages for the portion of the surface not affected by their operations and on which the homesteader could continue his agricultural or stock-raising activities unmolested by their operations. An injustice would be wrought upon a homesteader to place such a burden upon him and require him, at his peril, when the first entry is made by the lessees, to anticipate how much damage will be caused by the lessees' future occupancy of additional land. We feel that congress did not intend the statutes to place such a burden upon the homesteader, and that the intent of these statutes is that a new cause of action for damages arises upon each entry and occupancy of additional parcels of the homesteader's land. It may be that the lessee, under the statutes above referred to, has the right, upon re-entry under the lease, to bring suit to have the entire amount of damages assessed, prospective as well as accrued. This is indicated by the opinion in the case of Kieffer v. Kinney-Coastal Oil Co., handed down by the United States Circuit Court of Appeals and reported in 8 Cir., 9 F.2d 260, 263. This case was reversed by the Supreme Court on other grounds. Kinney-Coastal Oil Co. v. Kieffer, supra, 277 U.S. at page 507, 48 S.Ct. 580, 72 L.Ed. 961. If the lessee, at the time of entry, or upon completion of the first oil or gas well, knows how much of the surface he will have to occupy to carry out his mining operations on the property, the entire question of damages might be disposed of in one action. However, if such an action is not brought by the lessee, we do not believe that fact would toll the

statute of limitations as to the first or subsequent entries by the lessee under the lease, as the homesteader has his right of action for such damage which, if not seasonably commenced, will be barred. The issue of how much of the surface is required for all purposes reasonably incident to the mining and removal of oil and gas or other minerals from the homesteader's land ordinarily would be a question of fact to be determined on trial.

[6] Respondents urge that the case of Kinney-Coastal Oil Co. v. Kieffer, supra, is binding upon this court, and they state that it holds that, although only one well had been drilled on an eighty-acre tract, the use of all the surface was necessary in that producing oil field for the reasonably economical and efficient operations for oil and gas. Respondents then argue that appellant should have known, and this court should take judicial notice of the fact, that all of the surface of appellant's land is reasonably necessary for respondents' oil and gas operations and development and, therefore, but one cause of action arose and such cause of action arose at the time of the first entry by the respondents. But, in Kinney-Coastal Oil Co. v. Kieffer, supra, no attempt was made by the Supreme Court to fix a gauge or measure by which to determine, at the time of the first entry or the completion of the first well on the premises, how much of the surface will be reasonably necessary to carry out the lessees' obligations under the lease. In that case, that issue was determined as a question of fact at the trial. We recognize the principle that the state courts are bound by the construction of the federal laws by the federal courts. New York Central R. Co. v. Frank H. Buck, Co., 2 Cal.2d 384, 389, 41 P.2d 547; Hoogbruin v. Atchison, etc., Ry. Co., 213 Cal. 582, 586, 2 P.2d 992; Hines v. Industrial Acc.Comm., 184 Cal. 1, 16, 192 P. 859, 14 A.L.R. 720. But the case of Kinney-Coastal Oil Co. v. Kieffer, supra, was directed against the sale and use of the surface of the land for townsite purposes. Kieffer, the homesteader and limited patentee under the Agricultural Act of July 17, 1914, knowing one oil well was completed on the land and the others were comtemplated, had sold portions of the land as town lots and purchasers from him had built residences and store buildings on the homestead property; and Kieffer was proceeding to sell the remainder of the homestead for town buildings. The lessees brought an injunction suit to prevent the sale and use for townsite purposes of the agricultural homestead, on which the operations under the oil and gas lease were proceeding. The court held that the sale and occupancy of the surface for townsite purposes would seriously interfere with the lessees' mining operations; and that the lessees were entitled to an injunction to prevent the threatened use and occupancy of the surface for purposes incompatible with lessees' right to continue with their mining operations under the lease. There the threatened use by the agricultural homesteader was a use not contemplated by the Agricultural Homestead Act of July 17, 1914, under which the land was patented, and the evidence at the trial proved that the lessees would ultimately need the entire surface for their operations under the lease; and, obviously, it would impede the lessees' operations if a town should be built up on the land upon which they would be required to drill for oil and gas. That oil field, the court said, was a widely known producing oil field before any step was taken to secure either the lease or the patent. In the instant case, the amended complaint alleges that plaintiff's use of the land was confined solely to farming and sheep raising; and that plaintiff applied for his patent in 1919, which was several years before the discovery of oil in commercial quantities in the Kettleman North Dome oil field, in which the land is situated, and fourteen years prior to the completion of the first well on plaintiff's homestead, as shown by the amended complaint.

Respondents urge that, where the injury to the land is permanent, prospective as well as accrued damages can be recovered and, for that reason, the damage is original and gives rise to only one cause of action, and, in the instant case, this action was barred by section 338 of the Code of Civil Procedure. But that assumes that the original entry under the lease affected the entire half section of land so entered. It is our conclusion, as stated above, that such entry and each subsequent entry under the lease affected only so much of the surface as was required by respondents' operations on the respective portions of the land actually so occupied. Any cause of action arising out of such entries and occupancy which accrued prior

to three years immediately preceding the filing of this action would, of course, be barred.

[7, 8] As stated above, we feel that the entries of defendants under their leases did not constitute trespasses and, for that reason, subdivision 2 of section 338 of the Code of Civil Procedure does not apply. But, even if such an entry were regarded as a permanent trespass or injury to real property, the statute would begin to run when the trespass was committed. Civ. Code, § 3283; Williams v. Southern Pac. R. Co., 150 Cal. 624, 626, 89 P. 599. Moreover, the injury or trespass would relate only to the portion of the land so entered upon and occupied at the time, and not to the unoccupied portion of said section 30. Such entries made more than three years immediately prior to the filing of this action would, therefore, be barred, but the entries made within such period would not be barred. Code Civ.Proc. § 338, subd. 2. In any event, whether subdivision 1 or subdivision 2 of said code section applies, we believe the causes of action based upon the entries and occupancy by defendants made within three years immediately prior to the filing of this action are not barred by the statute of limitations, and that each of the causes of action set forth in the amended complaint states a cause of action against the defendants, and each of them; and that the demurrer to each of said causes of action should have been overruled.

[9-11] The amended complaint alleges that the facilities constructed by the defendants on plaintiff's land are used by defendants in handling oil and gas produced by themselves and others on lands outside of said section 30. The trial court took the position that neither cause of action alleged clearly that the increased use of these facilities and structures was injurious to plaintiff. In paragraph IX of the first cause of action and in paragraph X of the second cause of action it is alleged "* * * that the defendants, and each of them, have from time to time caused various gulches and ravines on the premises to be filled with oil and waste products from the aforesaid wells, and plaintiff is informed and believes, from other wells belonging to said defendants and located outside of said section 30". The filling of gulches and ravines on appellant's premises with oil and waste products from oil wells outside of appellant's land would naturally be injurious to his sheep grazing land and, we think, is an additional injury to his land not contemplated nor permitted by any of the statutes involved in the case, which statutes, as well as respondents' leases covering the appellant's land, gave respondent lessees only the right to "occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom", that is, from the land so entered and occupied by the lessee. Agricultural Entry Act of July 17, 1914, supra; Stock-Raising Entry Act of December 29, 1916, supra. While congress intended, by these laws, to encourage the extraction of oil and gas from such lands and to permit the United States to receive royalties therefrom, it also intended to protect the homesteader in his limited right to use the surface of the homestead. To permit said acts of the respondents alleged in paragraph IX of the first cause of action and paragraph X of the second cause of action, without granting appellant any recourse, would destroy the protection to the homesteader intended by the statutes. It is our opinion that the continuing or recurring injury to appellant from such use of appellant's land is without right and is in the nature of the continuing trespass giving rise to separate and successive causes of action for the consequential damages as the same are, from time to time, sustained; and that appellant is not barred from a recovery for such damages as have accrued within the statutory period. 4 Sutherland on Damages, 4th Ed. pp. 3849 to 3854; Kafka v. Bozio, 191 Cal. 746, 750, 218 P. 753, 29 A.L.R. 833; MacLeod v. Fox West Coast Theatres Corp., 10 Cal.2d 383, 387, 74 P.2d 276. However, to further overcome the objection raised by respondents that the amended complaint did not clearly allege the injury to plaintiff caused by such increased use of plaintiff's land, plaintiff moved the court for leave to amend the amended complaint, setting forth in his written motion the particular amendments which he proposed to make. These amendments, if allowed, would have corrected any such defect in the amended complaint and we are of the opinion that plaintiff's motion to amend the amended complaint should have been granted. Respondents endeavored to justify this added use of appellant's land by requesting the court to take judicial notice of the unit plan agreement between the respondents and others, under which respondent Kettleman North Dome Associa-

tion operates for the members of such association, the lands located in the North Dome of Kettleman Hills oil field. If we assume such an agreement, it would not give the respondents the right to use appellant's land in any manner or for any purpose not provided in the homestead and leasing acts above referred to and respondents would still be liable for all damage, if any, caused by such additional use of appellant's land.

[12-14] The second cause of action alleges that defendants entered upon the lands of plaintiff against his will, without payment of damages and without giving a bond therefor as required by the act of December 29, 1916. Respondents assert, and but briefly discuss, in their briefs the point that this court must take judicial notice of the fact that a bond was given by one of the respondents as required by the secretary of the interior in connection with the granting of a lease on said south half of appellant's land to which the second cause of action relates. It is well established that the courts of California take judicial notice of the executive acts of the government of the United States. Code Civ.Proc. § 1875, subd. 3; Livermore v. Beal, 18 Cal.App.2d 535, 539, 64 P.2d 987. In the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary. Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666; Livermore v. Beal, supra. However, we deem it unnecessary to comment upon the nature or sufficiency of this bond, or the effect of its execution and delivery upon the second cause of action, for regardless of its effect, we believe the judgment must be reversed for the reasons heretofore stated, namely,—that appellant can recover on his first cause of action for all damages caused by the entries upon the north half of appellant's land made by respondents within the statutory period; and also that the use and occupancy of both parcels of appellant's land by respondents to handle oil and gas produced on other tracts of land is in the nature of a continuing trespass, and appellant may recover for such resulting damages as he has sustained within the three years next preceding the filing of this action. For like reasons we express no opinion on the question of the measure of damages which was argued in the briefs. As to the second cause of action, if the bond mentioned in this paragraph of the opinion was in fact given, and if such bond affects the right of recovery of damages for lawful entry on the south half of said section 30, those matters should be pleaded and considered on the trial of the action. We may assume that those matters, as well as the proper statute of limitations to be applied if such a bond was given, and the correct measure of damages, will receive due consideration in the trial court.

The judgment is reversed and the cause remanded to the trial court, with instructions to take further proceedings in accordance with this opinion.

We concur: BARNARD, P. J.; MARKS, J.




38 Cal.App.2d 32

## DANDINI et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 11374.

District Court of Appeal, First District, Division 2, California.

March 15, 1940.

Rehearing Denied April 13, 1940.

Hearing Denied May 13, 1940.

1. Statutes ⇐225

The statutory provisions relating to the right of shareholders and directors to inspect the corporation's books should be read together as one statute. Civ.Code, §§ 355, 356.

2. Corporations ⇐181(3), 311

The statutory provisions relating to the right of shareholders and directors to inspect the corporation's books confer upon a shareholder the privilege to delegate to an agent or attorney his right of inspection, but do not give such power of delegation to a director who is not a shareholder. Civ.Code, §§ 355, 356.

3. Corporations ⇐311

A corporate director who is not a shareholder may summon such assistance as may be reasonably necessary to make effective his

right to inspect the corporation's books, but the right may not be delegated to an agent or attorney. Civ.Code, § 356.

**4. Mandamus ⇐186**

An order for writ of mandate from which court had stricken those portions purporting to require that corporate director who was not a shareholder be permitted to inspect the corporation's books through her accountant could not be construed as requiring that director be permitted to make inspection by her attorney or accountant, and hence officers of the corporation were fully justified in denying such "delegated" inspection, and were not guilty of contempt because of such refusal. Civ.Code, § 256.

Certiorari by A. O. Dandini and another, petitioners, against the Superior Court of the State of California in and for the County of Alameda to review an order adjudging petitioners guilty of contempt for their failure to comply with the terms of a writ of mandate.

Order annulled.

Hearing denied; CARTER, J., dissenting.

Leo Friedman, of Long Beach, for petitioners.

Johnson & Harmon, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Petitioners seek a writ of certiorari to review an order adjudging them guilty of contempt for their failure to comply with the terms of a writ of mandate.

Lillian Dandini, who is a director, but not a shareholder, of the Remillard-Dandini Co., procured a writ of mandate to compel the petitioners herein, as officers and directors of that company, to permit her to inspect the corporation's books. Mrs. Dandini appeared at the offices of the company with an attorney at law and an accountant whom she directed to make an examination and take an accounting of the ledger of the corporation and supporting documents. The petitioners herein refused to permit the attorney and the accountant to inspect these books and documents, but did not refuse to permit Mrs. Dandini to do so. The contempt proceedings rest squarely upon the refusal of these petitioners to permit such inspection.

In this proceeding in certiorari petitioners rest their case on two grounds—that the statute does not give a director the right demanded by Mrs. Dandini, and that hence the court was without power to direct petitioners to accord such privilege to her; and, second, that the alterations made by the court in the writ of mandate disclose that it was not intended to impose that obligation on the petitioners.

The statutory provisions pertinent to the controversy are found in sections 355 and 356 of the Civil Code. These sections as they now read were both adopted by amendment and revision at the legislative session of 1933. Stats.1933, p. 1388. The former deals with the rights of a shareholder to inspect the books of a corporation and directs that certain specified corporate books and documents "shall be open to inspection upon the written demand of any * * * shareholder * * *, and for a purpose reasonably related to his interests as a shareholder. * * * Such inspection may be made in person or by agent or attorney, and includes the right to make extracts. * * *" Section 356 deals with the right of a director only and declares that: "Every director shall have the absolute right at any reasonable time to inspect all books, records, documents of every kind and the physical properties of the corporation * * *." Briefly, the position of the petitioners is that the rights mentioned in section 356 are personal to the director and may be exercised by him alone. The respondent, appearing through counsel for Mrs. Dandini, argues that these rights may be delegated by the director to his attorney or other agent the same as under section 355.

[1-3] The parties agree that there are no authorities directly covering the question involved, and our interpretation of the statutes must therefore be based upon first impressions. It is our view from reading the sections together as one statute, that the legislature intended to confer upon the shareholder the privilege to delegate to an agent or attorney his right of inspection, but that it did not give this power of delegation to a director who was not a shareholder. We are also of the view that such a director has the right to summon such assistance as may be reasonably necessary to make his right of inspection effective. Thus we would not be inclined to go the whole way with either party to the controversy, but would take a middle course—that, since the shareholder's right of inspection "by agent or attorney" under section 355 is not repeated in section 356,

the legislative intention was to confine the director's right to the individual director in the case of any director who is not also a shareholder. But, since the director's right is made "absolute" and not limited to the books and documents specified in section 355, there is indicated the further intent in section 356 to put every director on a parity, but no reason is suggested why he should be permitted to open the books of the corporation to an attorney employed by him. There are many sound reasons why the rights conferred by section 356 on a director should not be delegated to an agent or attorney. The first suggesting itself is the customary effort of the minority director to cause trouble and litigation and stir up friction with the majority. In conferring the right to delegate upon the shareholder, section 355 takes particular pains to prevent misuse of the privilege—the books which may be inspected are specified, and the right is limited to "a purpose reasonably related to his interests as a shareholder". This limitation is always subject to judicial review to determine whether a lawful purpose exists, the right being denied the shareholder when it appears he is merely on a "fishing expedition".

[4] If the director must summon assistance in order to enjoy the right given, and this is denied him by the corporation, and if this is a "refusal of a lawful demand for inspection", then under section 357 of the Civil Code, the superior court may enforce such right "with just and proper conditions, or may appoint one or more competent inspectors or accountants to audit the books and records". This section was enacted at the same time in the same legislative session as sections 355 and 356. It discloses a clear intention on the part of the legislature to make the earlier sections effective, but at the same time, to repose in the superior court the power to insure that the privilege will not be abused. Acting under section 357 the respondent court issued its order for a writ of mandate which we copy in full showing the deletions which were made by the respondent court before signing:

"Upon reading and filing the verified petition for a writ of mandate filed herein, and good cause appearing therefor,

"It Is Ordered that an ~~alternative~~ writ of mandate be issued herein directed to the defendants A. O. Dandini, George P. Tobin, Pietro Caneli, Carlo Costa and Remillard-Dandini Company, a corporation, and requiring that they permit the petitioner, Lillian Remillard Dandini ~~and her accountants, Messrs. Timpson, Mayhew and Brissman,~~ to inspect all books, records, documents of every kind ~~and the physical properties~~ of the Remillard-Dandini Company, and to make extracts therefrom and to complete an audit thereof, and to that end, requiring said defendants to produce to said petitioner ~~and her accountants~~ at all ~~any~~ reasonable time such books, records and documents, ~~or that in lieu thereof the defendants be required to show cause before this court why they have not so done, and why this court should not appoint one or more competent accountants to audit said company's books and records and to investigate its properties, funds and affairs, and to report thereon as the court might direct and why this should not be done at the expense of Remillard Dandini Company.~~

"Dated this 4 day of ~~September,~~ October 1939.

"T. W. Harris
"Judge of the Superior Court"

The only reasonable inference to be drawn from the foregoing order as modified by the respondent court is that it was not designed to add to the privileges given a director by section 356 and that the director's right of inspection was not enlarged by the writ of mandate to include an independent inspection by her attorney or accountant. Further, it is apparent that the order does not purport to give the director the right to have her attorney inspect these books, if indeed such right could be enforced under the code sections, and the references to the accountants were expressly deleted by the court. Since the parties do not dispute that the director's demand included inspection by such agents individually the petitioners herein, as officers of the corporation, were fully justified in denying such "delegated" inspection. There is no basis for the charge of contempt and no proof that a contempt was committed.

The order is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

38 Cal.App.2d 42

**In re ALBERTS' ESTATE.**

**SPINNER v. JOHNSON, State Treasurer, et al.**

**Civ. 6291.**

District Court of Appeal, Third District, California.

March 18, 1940.

Hearing Denied May 16, 1940.

**1. Trusts ⇐44(3)**

The existence of a trust must be established by evidence that is clear and convincing, and question whether the evidence is of such a nature is one to be determined by trial court.

**2. Trusts ⇐14**

The establishment of a trust in præsenti is a necessary element to the creation of a trust, since the creation of a trust is a present disposition of property, and not an undertaking to make a disposition in the future.

**3. Gifts ⇐5(3)**

The only important difference between a "gift" and a "voluntary trust" is that in the case of a gift the thing itself passes to the donee, while in the case of a trust the actual, beneficial, or equitable title passes to the cestui que trust, while the legal title is transferred to a third person, or retained by the person creating it, to hold for the purpose of the trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift" and "Voluntary Trust".

**4. Trusts ⇐63¾**

Equity will not give effect to an imperfect gift by enforcing it as a trust, merely because of the imperfection, since to do so would be to give effect to an intention never contemplated by the maker.

**5. Trusts ⇐34(3)**

A trust can be created in bank account moneys by handing the saving account book to the intended beneficiary and by using the proper words of manifestation of a trust.

**6. Gifts ⇐18(2)**

To constitute a valid "gift" of personalty, there must be complete divestment of all control by the donor, regardless of whether the delivery of the property is actual or symbolic.

**7. Gifts ⇐30(3)**

Where bank depositor surrendered to third person his bank book with the intention of making gift of savings accounts represented by book, and subsequently obtained return of book on numerous occasions to make deposits and withdrawals and had book in his possession at time of his death, title to savings account did not pass to third person by way of a "gift", since depositor had not completely divested himself of control over the savings account.

**8. Trusts ⇐34(1)**

A valid "recoverable trust" may be created in a savings account with power remaining in the settlor to withdraw a part or all of the money where the settlor is named as trustee, and the beneficiary is entitled to the balance on hand at the death of settlor, if no other disposition has been made by him.

See Words and Phrases, Permanent Edition, for all other definitions of "Recoverable Trust".

**9. Trusts ⇐42**

In action to establish trust in savings account, writings on bank book envelope and on a separate piece of paper, found after depositor's death, indicating manner of disposition of savings account, were admissible as determining intent of depositor at time of his alleged creation of trust in savings account by giving, to plaintiff, bank book which was subsequently returned to depositor to enable him to make deposits and withdrawals and was in depositor's possession at time of his death.

**10. Wills ⇐91**

Writings by a depositor on his bank book envelope and on a separate piece of paper, stating manner of disposition of savings account, could not after depositor's death be given effect of creating a trust at the time of their execution or upon the death of depositor in favor of party named in writings, since to give them such an effect would be to contravene statutory requirements as to prerequisites of a written will.

**11. Wills ⇐108**

Testamentary dispositions must conform and be given effect only through a validly executed will.

**12. Trusts ⇐59(1)**

A private trust in a savings account, if created by transfer by depositor to third person of bank book, was revocable by deposi-

tor, and depositor, who committed suicide after regaining possession of bank book, by leaving behind a writing stating that he sent bank book to third person and containing words "Usit for the sick only", "P. S. For charity only", indicated a change of mind as to creation of private trust, notwithstanding fact that depositor had written on bank book envelope words, "All for you", since conflict must be resolved against creation of a trust.

13. Trusts ⇐371(8)

In suit to establish a private trust in a savings account, plaintiff, having failed to show a clear and convincing transfer of bank account moneys to her for her use and benefit, could not claim that she was trustee of the money for charitable purposes, where suit was not brought for purpose of enforcing a charitable trust, no evidence for such purpose was introduced, and separate writing left by depositor on his death could not be given effect of creating a charitable trust, where to do so would be to contravene statutory requirement necessary for a valid will.

---

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding in the matter of the estate of Alfred Alberts, by Nettie Spinner against Charles G. Johnson, State Treasurer of California and Harry Riley, State Controller of California, to establish a trust in moneys left in a bank account. From an adverse judgment, petitioner appeals.

Affirmed.

George W. Rochester, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Albert Zangerle, Deputy Atty. Gen., for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment rendered against appellant upon an action brought to establish a trust in moneys left in a bank account.

The circumstances giving rise to appellant's claim as evidenced by the testimony and which is not contradicted, are that appellant, Mrs. Nettie Spinner, met Alfred Alberts some time in the year 1911, and they became and remained friends until the time of his self-inflicted death on May 15, 1933. In 1921 Nettie Spinner married Andrew Spinner, a member of the Los Angeles Police department. When it was discovered, shortly after the marriage, that Mr. Spinner was also a friend of Alberts, he was invited to visit them at their home, and thereafter became a frequent visitor at their home, and on three or four Christmas days was a special guest at dinner. It appears that Alberts had no relatives or close friends, and was considerably older than Mr. and Mrs. Spinner.

Prior to July, 1931, Alberts had opened a savings account in his own name with the Security Trust and Savings Bank of Los Angeles. At the time of his death on May 15, 1933, there was on deposit in such account, approximately $14,000. No heirs having been discovered during the administration, this money, which constituted the entire estate of Alberts, was, on February 21, 1935, distributed to the state of California as provided by law, and is still held by the state treasurer as custodian.

Some time in July, 1921, Alberts went to see Mr. Spinner and turned over his bank book to him, stating that it was to be given to Mrs. Spinner and that he, Alberts, was giving Mrs. Spinner his money as represented by the savings account in the bank book. The bank book was given to Mrs. Spinner, and Mr. Spinner told her of the conversation with Alberts. Mr. and Mrs. Spinner testified that on a number of occasions subsequent to this event Alberts stated to them that the money was for Mrs. Spinner; that it would take care of her if anything happened to him. Mrs. Anderson, a friend of Mrs. Spinner, testified that on one occasion while in the Spinner home, Alberts had stated to her that he had given everything to Mrs. Spinner.

In July, 1931, not long after Alberts had given the bank book to Mr. Spinner, he requested that it be returned to him for the purpose of making a deposit or withdrawal. The request was granted, and after Alberts had used the book for the purpose stated it was returned to Mrs. Spinner. Thereafter the bank book was turned over to Alberts at various times for the purpose of making deposits or withdrawals, and always returned to Mrs. Spinner. Toward the last of April, 1933, the bank book was again given to Alberts and he failed to return it to Mrs. Spinner.

Alberts shot himself on May 15, 1933, and died without making any statement. The bank book, together with other per-

sonal belongings, was found on his body. The book was enclosed in a regular bank envelope and on each side thereon Alberts had written the following: On one side he had written "Good-bye M. Spinner x x," and on the other side, "For Mrs. Spinner. All for you," signing his name, "A. Alberts". A separate writing enclosed in an ordinary envelope was also found on the person of Alberts. Written upon the envelope was the following: "Notify A. C. Spinner, C/o Georgia Street Division Detective Bureau, Los Angeles Police Department." Upon the paper was written, "Lotty Spinner I send you my bank book. You shall have all my belonging including every in my room in the hotel. Usit for the sick only. A. Alberts. P. S. For charity only."

[1-4] We are of the opinion that the judgment appealed from is supported by the evidence and implied findings and that there has been a failure to show the creation of a trust for the benefit of appellant.

The existence of a trust must be established by evidence that is clear and convincing and this question as to whether the evidence is of such a nature is one to be determined by the trial court. The establishment of a trust in praesenti is a necessary element to the creation of a trust just as it is with the consummation of a gift. The creation of a trust is a present disposition of property, and not an undertaking to make a disposition in the future. The only important difference between a gift and a voluntary trust is that in the case of a gift the thing itself passes to the donee, while in the case of a trust the actual, beneficial, or equitable title passes to the cestui que trust, while the legal title is transferred to a third person, or may be retained by the person creating it, to hold for the purpose of the trust. Norway Sav. Bank v. Merriam, 88 Me. 146, 33 A. 840. The rule is well established that equity will not give effect to an imperfect gift by enforcing it as a trust, merely because of the imperfection, since, to do so would be to give effect to an intention never contemplated by the maker. Noble v. Learned, 153 Cal. 245, 94 P. 1047.

[5] The present action was one to enforce a trust in the bank account money and was not based on the theory of a gift. However, it cannot be denied that the statements made by Alberts to appellant and her husband, together with the circumstance of the handing over of the bank book to appellant in July, 1931, indicated a voluntary assignment or a gift of the money represented by the savings account in the bank book. It is not denied that a trust could be created in bank account moneys by handing the savings account book to the intended beneficiary and by using the proper words of manifestation of a trust.

The cases upholding the creation of a trust in savings accounts which are cited by the appellant, discloses facts which do not appear in the present case. In those cases the bank books were either held by the depositor himself as trustee, or they were transferred to a third person, as trustee, for the beneficiary. As stated, the delivery of the bank book to the party intended to be beneficially interested indicates a gift rather than the creation of a trust.

[6, 7] The evidence here in regard to the possession and control of the bank book discloses, however, that at the request of Alberts it was returned to him for the purpose of making withdrawals and deposits in his account. Alberts never completely divested himself of control over the bank book or of control over the money represented by the bank book. Complete divestment of all control by the donor is a necessary essential to constitute a valid gift of personal property. 13 Cal.Jur. 32, sec. 1. This is true regardless of whether the delivery of the property is actual or symbolic. This essential element necessary for a valid gift not being present, appellant has no interest in the savings account of Alberts by way of gift.

Assuming that Alberts intended the appellant to have an interest other than that as bailee at the time the book was turned over to appellant, it is our opinion that the evidence fails to support the creation of either a private or charitable trust. In order to uphold the creation of a trust it was necessary that the trust should have been established in praesenti in July, 1931, when the bank book was turned over to appellant. The evidence does not support such a conclusion. A perusal of a great number of cases wherein it has been held that a trust was created in a savings account fails to disclose the existence of circumstances presented in this case. Those cases show that the depositor either opened an account in his own name as trustee, or in his own name as trustee for a named beneficiary, by the execution and delivery of a separate writing manifesting the trust.

The cases also support the validity of a bank account trust where the settlor merely makes an oral declaration that he is holding the bank account money in trust. It will be noted, however, that in no case where there has been a finding of a valid trust pursuant to an oral agreement, has there been a transfer of the bank book to the intended beneficiary.

[8] It would seem to be settled in California that a valid trust may be created in a savings account with power remaining in the settlor to withdraw part or all of the money where the settlor is named as trustee. The beneficiary is entitled to the balance on hand at the death of the depositor, if no other disposition has been made by the settlor. This is obviously a recoverable trust. A deposit of this nature is termed a "tentative trust" by the the New York cases. The delivery of the bank book to the intended beneficiary is not, however, contemplated as one of the acts of the settlor in conformity to the continuation of such a trust. This proposition finds support in Re Matter of Totten, 179 N.Y. 112, 71 N.E. 748, 70 L.R.A. 711, 1 Ann.Cas. 900, a leading case in that state in regard to "tentative trusts". At page 126 of 179 N.Y., at page 752 of 71 N.E., the law is stated as follows: "* * It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary."

A trust of this nature would not exist if the depositor put it out of his power to control the money in the savings account. If, as contended for in the present case, the appellant became a trustee and held legal title in and to Alberts' savings account, it was clearly inconsistent with the theory of a trust that Alberts retained power to take back the bank book and make deposits and withdrawals.

[9-11] The writing on the bank book envelope and the writing on the separate piece of paper enclosed in an envelope which directed that Mr. Spinner be notified was properly admissible for the purpose of determining the intent of Alberts at the time of the alleged creation of the trust in July, 1931. These writings could not be given the effect of creating a trust at the time of their execution nor upon the death of Alberts. To give them such an effect would be to contravene our statutory requirements as to the prerequisites of a written will. Testamentary dispositions must conform, and be given effect, only through a validly executed will.

[12] Resorting to the writing on the separate piece of paper for the purpose of determining the intent of Alberts in July, 1931, it clearly appears that a trust for the benefit of appellant was not intended; or that if Alberts did intend a trust solely for the benefit of Mrs. Spinner he had changed his mind, and so indicated by his writing on this paper. A trust, if ever created, was revocable by Alberts. The words used by Alberts: "Usit for the sick only" and "P.S. For charity only," are clear and of common meaning to all. The explanation offered by appellant that Alberts intended her to use the money for her own sickness, is not satisfactory. He has not used the words, "for your sickness" or "for your charity". It is true that Alberts had written on one side of the bank book envelope, "For Mrs. Spinner. All for you," but this writing only raised a conflict in the evidence as to the intention of Alberts. This conflict must be resolved against the creation of a trust for the benefit of appellant, when the writing on the separate piece of paper is considered.

[13] Appellant having failed to show a clear, unequivocal, and convincing transfer of the bank account moneys to her for the use and benefit of herself, it cannot now be claimed that she is a trustee of the money for charitable purposes. This suit was not one for the purpose of enforcing a charitable trust, and no evidence for such a purpose was introduced. The separate writing left by Alberts cannot at this time be given the effect of creating a charitable trust, as to do so would be to contravene the statutory requirement necessary for a valid will.

Appellant having failed to establish either a private or a charitable trust, it is not necessary for this court to determine the question as to whether this action was proper under section 1027 of the Probate Code.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

37 Cal.App.2d 698

**AHLBORN v. PETERS et al.**

**Civ. 12406.**

District Court of Appeal, Second District, Division 2, California.

March 8, 1940.

1. Wills ⇐433

Unless a lost or destroyed will is admitted to probate pursuant to statutory provisions concerning special proceedings with respect to lost and destroyed wills, its contents afford no evidence of inheritance, except under extraordinary circumstances. Probate Code, §§ 350–352; Const. art. 6, § 5.

2. Wills ⇐248

A judge of the superior court is bound to hear and determine "in probate" the merits of claims relating to lost and destroyed wills and cannot admit nor deny a will to probate while he sits in any other character. Probate Code, §§ 350–352.

3. Wills ⇐281

In equitable proceeding, a complaint which alleged that plaintiff was a devisee under his maternal aunt's will which was never admitted to probate and that defendants conspired to defeat plaintiff's inheritance by destroying alleged will and committing certain other acts, for which plaintiff claimed damages, did not state a cause of action, especially where no facts were alleged that would render defendants liable under statute concerning liability of custodian of a will for failing to deliver it to clerk of superior court. Probate Code, §§ 320, 350–352.

4. Wills ⇐98

Where a dated letter in decedent's handwriting stated that decedent had made a new will and referred to an undated document, which was not incorporated into letter, and letter disclosed an intent by decedent to make a witnessed will, and letter did not evince an intention by decedent that letter should constitute a will, the letter and document, which made a disposal of decedent's property, did not fulfill requirements of a "holographic will", as defined by Probate Code. Probate Code, §§ 50, 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

5. Wills ⇐97

A date written upon a letter found with a purported will is without efficacy to establish the will, when the will has no date, unless the will itself is specifically incorporated in the letter. Probate Code, §§ 50, 53.

6. Wills ⇐130

An intention by decedent that an instrument in decedent's handwriting should constitute decedent's last will is indispensable to validity of a "holographic will." Probate Code, § 53.

7. Wills ⇐98

In order for a document, which is incorporated by reference in an ordinary letter, to gain the status and force of a will, such document must be in existence when the letter is written.

8. Wills ⇐98

A nontestamentary document cannot incorporate an incomplete writing containing only some of the essentials of a holographic will in such a way as to give the adopted paper testamentary completeness. Probate Code, § 53.

9. Wills ⇐129

Under statute concerning liability of custodian of a will for damages sustained by custodian's failure to deliver will to clerk of superior court within 30 days after being informed that maker thereof is dead, possession of a will by a custodian resulting from will having been confided to care of such custodian by author thereof and failure to present will to proper official within 30 days after the decease are indispensable elements to maintenance of an action for damages against custodian. Probate Code, § 320.

10. Wills ⇐127

That defendants, after deceased's death, found two documents which plaintiff claimed constituted deceased's will, did not make defendants "custodians" within meaning of section of Probate Code concerning liability of custodian of a will for damages in event of failure to deliver will to clerk of superior court after deceased's death. Probate Code, § 320.

See Words and Phrases, Permanent Edition, for all other definitions of "Custodian".

11. Wills ⇐127

If one is competent to make a will, he may select his own custodian and cause the

**will to remain in the custody of such custodian until called for or until testator's decease.**

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding by Frederick R. Ahlborn against Grace Raymond Peters, and others, for damages from an alleged conspiracy by defendants to defeat plaintiff's inheritance as residuary legatee under an instrument claimed to have been the last will of plaintiff's maternal aunt. From three judgments entered against plaintiff after defendants' demurrers to the complaint had been sustained without leave to amend, plaintiff appeals.

Judgments affirmed.

Cantillon & Glover, J. F. T. O'Connor, and A. Ronald Button, all of Los Angeles, for appellant.

Freston & Files, by Ralph E. Lewis, all of Los Angeles, for respondents Grace Raymond Peters and Ida Lillienkamp.

MOORE, Presiding Justice.

Plaintiff appeals from three judgments entered against him after the demurrers of the several defendants to his complaint had been sustained without leave to amend. In substance his complaint sets forth that he was named as residuary legatee under the last will of his maternal aunt, Louie E. Raymond, deceased; that she left, at the time of her decease in July, 1937, an estate of the value of $500,000; that defendant Grace Raymond Peters is his mother;

"V. That shortly after the death of Louie E. Raymond, the defendants Grace Raymond Peters and Ida Lillienkamp found among the decedent's papers and effects two documents written, signed and dated entirely in the handwriting of decedent, one of which was subsequently destroyed as will hereinafter appear. The provisions of the document so destroyed are in substance as follows:

" 'I, Louie E. Raymond, make this, my Last Will and testament, and hereby revoke any and all former Wills. To my brother, Howard Raymond, I leave the sum of Ten Thousand Dollars ($10,000.00). To my brother, Gordon Raymond, I leave the sum of Ten Thousand Dollars ($10,000.00). To my sister, Grace Raymond Peters, I leave the sum of Ten Thousand Dollars ($10,000.00). To Ida Lillienkamp, my maid, I leave the sum of Three Thousand Dollars ($3,000.00). The remaining portion of my Estate, I leave to my nephew, Frederick R. Ahlborn, and my nephew, Morton Raymond and my niece, Hope Raymond, share and share alike. Louie E. Raymond.'

"The other document now in existence reads as follows:

" 'February 3, 1933 Dear Grace—In December I made out a new will, which is here in my box at home. I have intended making a few minor changes and then having it typed and witnessed, but you know how I procrastinate about everything. I haven't even made out a list of how I want to dispose of my clothing, furniture, jewelry, etc. I'll not bother about that now but trust to your discretion. There are a few things I know Mrs. Mitchell would love to have and Constance would want that Japanese water color and of course Ida must have Sally, for I've already given her to her. My business papers will seem in a muddle for anyone else to understand but they are easy for me. A little note book in the top file and one in my desk really correspond and should be of help. I am not very demonstrative but you and the boys and your families have meant oh so much to me since mother left me alone and I want you to know how I love you all. Being my only sister it is only natural you and Frederick come first in my affections, for we have lived where we could see each other almost daily all these years. Thanks for all the help you and Ben have given me. I'd love to have you live in my house if you care to take that as part of your share of my estate. Yours fondly, Lute. I think you all know I desire to be buried beside Mother in Rosehill.' "

He then alleges a conspiracy of defendants to defeat "his inheritance created by said document which was subsequently destroyed" about August 10, 1937, and to gain, by their fraud, said estate for themselves; that in furtherance of said conspiracy, defendants prepared a writing, "Exhibit A" dated June 16, 1937, which they placed among decedent's effects to convince the other heirs of decedent that it had been prepared by decedent as evidence of her last wishes, namely, that the residue of her estate should go to defendant Peters and her two brothers in equal shares after leaving generous and specific legacies to defendants Peters and Lillienkamp; that

said Peters through defendant Rollinson as her counsel, applied for letters of administration upon said estate, alleging no will; that she was appointed and then agreed to pay said Rollinson $40,000; that because said Gordon and Howard Raymond, brothers of said Peters, believed said "Exhibit A" to be a genuine writing prepared by decedent, they agreed with said Peters in writing (exhibit B) to the distribution of said estate as suggested by said exhibit A; that defendants Peters and Rollinson thereafter procured an order for the payment of the sum of $15,000 to be paid to said Lillienkamp as provided by said exhibit A; that said Peters paid to said Rollinson $27,000 and to said Lillienkamp $3,500; that said Peters was thereafter removed as administratrix by said superior court and was surcharged with an order charging her with the payment of about $36,000; that by reason of said acts of defendants and their failure to reveal the existence of said destroyed document, plaintiff had been deprived of his inheritance and damaged in the sum of $156,666.66.

To the lengthy complaint, demurrers were filed by each of the three defendants upon the following grounds: (I) that the court has no jurisdiction of the subject matter of the action; and (II) that the complaint does not state facts sufficient to constitute a cause of action. The demurrers were severally sustained without leave to amend. Judgments ensued that plaintiff take nothing by his action and each defendant was allowed his costs.

[1] I. We thus have an equitable action filed by one who asserts himself to be a devisee under a will that was never presented for probate. He alleges damages by virtue of his claim that he was named as residuary legatee in a destroyed will. But, pursuant to the Constitution (art. VI, sec. 5), the legislature has codified the laws relating to succession in the Probate Code. By its provisions, lost and destroyed wills are the subject of a "special proceeding"; the court in conducting such "special proceeding" has exclusive jurisdiction of that subject. Probate Code, secs. 350–352. The method of establishing such destroyed will is derived from said sections. Unless it be admitted to probate pursuant to those provisions, its contents afford no evidence of inheritance except under extraordinary circumstances, exemplified in certain cases hereinafter mentioned. This exact question has been considered by the Supreme Court which declared "that, if a court of chancery cannot entertain direct jurisdiction to establish a will, it can possess no jurisdiction to do so as incident to jurisdiction over other matters. Such a course would lead to grave complications, would destroy the uniformity contemplated in the mode and manner of proof, and would be opposed to the system established by the constitution and statutory laws of California." McDaniel v. Pattison, 98 Cal. 86, 102, 27 P. 651, 654, 32 P. 805. In that case plaintiffs alleged that they were "devisees" of decedent under an unprobated will fraudulently destroyed; "that this action is not brought for the purpose of probating a will" by whose provisions plaintiffs were bequeathed two-thirds of decedent's estate; that one heir, a defendant, has fraudulently destroyed the will and fabricated a deed by which it appears that decedent has conveyed to said defendant all of his property; that "it is impossible that this destroyed will could ever be proved".

[2] Following a review of the authorities, it was held that "a court of equity will not recognize nor act upon a will of land or of personal property until it has been admitted to probate"; that "a court of chancery has no inherent power, either in England or America, to establish a lost will". No California case holds adversely to this. It would be contrary to sound reason and to the genius of our jurisprudence to hold that a Chancellor may establish a will before it is offered for probate or that after one judge of the superior court has declined, while sitting in probate, to allow a "destroyed" will, he should be required to open another file and proceed to hear the same evidence for the purpose of validating the same will as he sits "in equity". He is clothed with the same power as he considers causes in either equity or in probate but the law requires him to hear and determine "in probate" the merits of claims relating to lost and destroyed wills (Sec. 350, Probate Code), and he may not admit a will nor deny it while he sits in any other character. Any person claiming to be entitled to the distribution of the estate of a decedent "may file a petition in the pending probate proceeding to have the court ascertain and declare the rights of himself and all others to the estate or any interest therein. * * * the policy and intent of our statute very clearly contemplates that property of decedents shall be subjected to the process of administration

in the probate court". Trout v. Ogilvie, 41 Cal.App. 167, 182 P. 333, 336. Emphatically the provisions of the Probate Code could not be repealed by the decree of the Chancellor whose authority does not transcend the law, whose servant he is.

In support of his complaint and in order to avoid the holding of the Pattison case, supra, plaintiff presents certain decisions of our courts and others from beyond the border. The Estate of Sloan, 7 Cal.App. 2d 319, 46 P.2d 1007; Estate of Johnston, 188 Cal. 336, 206 P. 628, and Estate of Bassett, 196 Cal. 576, 238 P. 666, are cited to show that the effect of the Pattison holding is merely that an unprobated will is inadmissible for any purpose and that such holding has been overruled.

The Estate of Sloan, supra, arose upon a petition for the distribution of a testamentary trust estate held by the Security First National Bank of Los Angeles. By the terms of the will, the trustee was to hold the estate in trust until William Sloan, son of the author of the testamentary trust, should reach the age of 30 years, or if he should die under the age of 30 years, the trust estate should "be distributed by a court of competent jurisdiction to the heirs of said William * * * as per his last will and testament". [7 Cal.App.2d 319, 46 P.2d 1008.] William died before attaining the age of 21 years in the state of Massachusetts. He had made his last will bequeathing his estate to Eleanor Robinson, his maternal aunt, but the Massachusetts court having denied probate of William's last will because of his minority and the said trustee having applied for an order of distribution of said trust estate pursuant to the terms of said will of the said William, this court held that although the said will was invalid, its provision with reference to the exercise of the power of appointment was provable in this state; that since the word "heirs" designated a class, that no member of a class designated by the donor may be entirely excluded by the donee of the power from at least a substantial participation in the trust fund; "that the power created by its donor was mandatory" not precatory, and ordered that "such proceedings only be had in the lower court that, after a determination by it of the names of the persons who * * * are entitled to distribution of the estate as heirs of the donee of the power, an order be entered by which such persons, or their respective representatives, will share in the assets of said estate in accordance with their respective rights as such heirs".

The facts of that case and its holding clearly distinguish it from that of McDaniel v. Pattison, supra. In the Estate of Johnston, 188 Cal. 336, 206 P. 628, the holding was substantially this and no more: that the due execution of a later will, destroyed animo revocandi may be proved by one witness in order to give effect to its revoking clause. In the Estate of Bassett, supra, it was held that a will containing provisions inconsistent with an earlier will revoked said earlier will so far as the latter is inconsistent with the last will, and where the last will revokes the earlier, proof may be made by one witness for the purpose of working a revocation of the earlier will. The same is substantially held in the Estate of Thompson, 185 Cal. 763, 198 P. 795.

It is a conspicuous feature of the three California cases cited by counsel that they deal merely with procedural matters in probate proceedings. Those authorities do not attempt to establish, nor do they indicate that the probate court can be over-ridden by a chancellor, of coordinate authority, merely because they hold that, in attempting to derive the final intention of a testator from his acts in executing his successive testaments, the courts may establish the last will by the oath of one witness or may cause the distribution of the trust estate by the exercise of a power conferred by a trust indenture under such circumstances as are disclosed in the Estate of Sloan, supra.

As to the decisions coming from the sister states, plaintiff relies upon Creek v. Laski, 248 Mich. 425, 227 N.W. 817, 65 A.L.R. 1113, and Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689, L.R.A.1917B, 556. These cases would be persuasive only if we had no California authorities upon the subject at hand. Whatever support they might give to plaintiff's pleading is of no value in view of the paramountcy of our own Probate Code and of the reasoning and authority of McDaniel v. Pattison, supra, which appears to be definitive. Assuming, without conceding, the pertinency of these decisions, authorities from sister states instantly pale in the light of California statutes providing for proceedings with reference to the probate of destroyed wills.

[3] II. No cause of action is stated because (a) there is no provision of the

law for a will to be probated by an action in equity as we have demonstrated in division I hereof; (b) there was no will and (c) plaintiff does not present a case contemplated by section 320 of the Probate Code.

[4-8] (b) The two documents quoted in the complaint do not fulfil the requirements of a holographic will defined by the Probate Code as "one that is entirely written, dated and signed by the hand of the testator himself. * * * No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will." (Probate Code, sec. 53.) If a date printed or stamped upon a purported holographic will invalidates it, then surely a date written upon a letter found with a purported will is without efficacy to establish the will which has no date unless the will itself be specifically incorporated. The letter written by decedent dated February 3, 1933, and which is claimed by the plaintiff to give validity to the purported will, sets forth that *she made out a new will in December; that she intended making a few minor changes and having it typed and witnessed.* This language discloses the intention of the decedent to make a witnessed will provided for by section 50 of the Probate Code, which requires declaration and subscription of the testator in the presence of two witnesses. Of course, the first quoted document might have been a will had it been dated by the writer. But the letter bears the only date while it contains none of the essentials of a holographic will except that it was entirely written by the hand of decedent. It evinces no indication of the intention of the deceased that it should constitute her last will. Such intention is indispensable to the validity of a holographic will. Estate of Miller, 128 Cal.App. 176, 17 P.2d 181. On the contrary, it shows that some other paper yet to be completed would constitute her will. In order for a document, which is incorporated by reference in an ordinary letter, to gain the status and force of a will, such instrument must be in existence at the time of the writing of such letter. Estate of Miller, supra. The will referred to in the letter has never been written and, besides, the undated document was not incorporated into the letter. It follows that there is nothing from which we may conclude that said undated document was intended to be her will. A nontestamentary document cannot incorporate an incomplete writing containing only some of the essentials of a holographic will in such a way as to give the adopted paper testamentary completeness. Estate of Miller, supra; Estate of Dexter, 179 Cal. 247, 176 P. 168.

In the Estate of Dexter, supra, cited by plaintiff, the intention of the testator was the only question for determination. On May 8th she wrote a memorandum giving some advice, yet there was nothing therein contained calculated to cast doubt upon her testamentary intention as expressed in her will which was written as an addendum to said memorandum, and fully dated May 9, 1904, written and signed with her own hand. Her will was complete in its contents which was in substance as follows: "My estate to be distributed among my nieces and nephews. You act as my executor." There was nothing in said memorandum contrary to the sentiments expressed in her will and it was not necessary to the perfection of the will.

In the Estate of Miller, supra, the decedent left a complete holographic will. Folded within it was an undated document written in its entirety by the decedent. The trial court concluded as a matter of law that the two papers taken together constituted her last will. There was nothing contained in the inner document contrary to her dated will. The court justifiably held that the inner document constituted a part of the will because the language contained therein is practically a repetition of that contained within the dated document. Both writings indicated the intention of the decedent that they should take effect after his death.

[9-11] (c) Conceding for the argument that the writings constitute a will, there are no facts alleged that would make either defendant liable under section 320 of the Probate Code which provides as follows: "The custodian of a will, within thirty days after being informed that the maker thereof is dead, must deliver the same to the clerk of the superior court having jurisdiction of the estate, or to the executor named therein. Failure to do so makes such person responsible for all damages sustained by anyone injured thereby." There is no provision in the section that

would apply to the facts of the instant case. Two elements are indispensable to the maintenance of an action for damages against such custodian, namely: (1) the possession of a will by a custodian resulting from its having been confided to the care of such custodian by the author thereof; and (2) failure to present the same to the proper official within thirty days after the decease. Neither is alleged. On the contrary, it is alleged that after the death of decedent, defendants found two documents which, plaintiff alleges, constitute decedent's will. This did not make them custodians. If one is competent to make a will, he may select his own custodian and cause the will to remain in such custody until called for or until the testator's decease. Mastick v. Superior Court of San Francisco, 94 Cal. 347, 29 P. 869. In that case, it was held that a custodian can only be taken to mean a person chosen in advance and entrusted with the custody of the will.

In support of his contention that defendants are liable under said section 320, plaintiff cites the case of Snyder v. Security First National Bank, 31 Cal.App.2d 660, 88 P.2d 760. But that decision demonstrates the codified principle that one who is entrusted by the testator with the custody of a will is liable for damages resulting from his failure to keep and report the will. Decedent had departed life in February, 1930. For some time prior thereto, the defendant was the custodian of the decedent's will dated August, 1919, making the decedent's daughter the sole beneficiary. After said decease, on February 13, 1930, administration of the estate was opened in the state of Montana and the administrator appointed by the Montana court made demand upon the defendant March 20, 1930, for all documents and papers of the deceased in the possession of defendant. Defendant delivered numerous papers and bonds but no will. It retained possession of his said last will until April, 1936, when the administrator had already depleted the estate in its attempt to satisfy the claims of numerous legatees under a prior will executed in 1917. Those facts present an ideal case for the application of the penalties of said section 320 to a careless custodian.

The judgments are affirmed.

We concur: WOOD, J.; McCOMB, J.

38 Cal.App.2d 69

## In re LOVEJOY'S ESTATE.

## EATON v. SAN DIEGO TUBERCULOSIS ASSOCIATION & REST HAVEN PREVENTORIUM.

Civ. 2373.

District Court of Appeal, Fourth District, California.

March 19, 1940.

**Wills ⇐565(1)**

Under will providing "all my property to be sold," and proceeds after payment of expenses to go to named legatee, then listing evidences of ownership of realty and personalty, including corporate stock and bank accounts, and then providing "my personal property to be given to [named person] for her to distribute," executrix did not use "property" and "personal property" in their legal and technical sense, but by "personal property" meant only "personal effects." Civ.Code, § 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Property" and "Personal Property".

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Proceeding in the matter of the estate of Harriet Lovejoy, deceased, wherein Mrs. Fred Eaton appealed from a decree determining that she was entitled on distribution to receive only the personal effects of the deceased, and that the San Diego Tuberculosis Association and Rest Haven Preventorium was entitled to all other property.

Affirmed.

W. C. Wilde, of San Diego, for appellant.

E. Swift Torrance, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree determining that the appellant was entitled, on distribution, to receive only the personal effects of the deceased and that the respondent was entitled to all other property left by her.

The question presented in the trial court and upon this appeal is as to the proper interpretation of the next to the last paragraph of an holographic will left by the deceased, which reads as follows:

"My Last Will and Testament.

"I wish to be cremated, (ashes *not* to be sent East) All my property to be sold. After all expenses paid. If anything left to go to Rest Haven—Home for Children, in San Diego—California.

"Deeds & Contracts of property, consisting of lots in San Diego—California and vicinity in my box at Bank of America, Broadway & Sixth Sts. San Diego—California.

"Harbison Canon—lot 12—block C.

"Sunset Cliffs—lot—19—block 8.

"Crown Point—lots—81 and 287.

"*Lost* Avocado lot at Encinitas—California to Ed Fletcher—June 1931.

*"In my box, San Diego California.*

"One share in Commonwealth Edison Company No. 320962, Chicago—Illinois.

"Money in Savings Dept. of First National Bank—San Diego. Bay City Loan Association, San Diego, California.

"First State Bank—South Haven—Michigan.

"My personal property to be given to Mrs. Fred Eaton 4135 Ibis St. San Diego—California, for her to distribute.

"I have appointed Mr. Fred Eaton—4135 Ibis St. San Diego,—California—as my executor, without bonds.

"Harriet Lovejoy
"San Diego—California
"October 4—1934."

The appellant contends that it conclusively appears that the words "All my property" in the first paragraph of the will refer only to real property and that the words "personal property" in the next to the last paragraph should be interpreted as those words are defined in the Civil Code (section 663). The respondent argues that the words "personal property", as used in the bequest to Mrs. Eaton, should be interpreted in the more limited sense of purely personal effects.

In considering a similar problem the court, in Estate of La Fetra, 14 Cal.App.2d 599, 58 P.2d 678, 679, said: "In the interpretation of wills section 106 of our Probate Code enjoins upon courts the duty to view the testamentary words in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained; while technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention or discloses that the testator was unacquainted with such technical sense. [2] In determining the intention of the testatrix here we must, as appellants insist, stand by the words of the will, and no intention should be attributed to the testatrix which cannot reasonably be drawn from the language of the document itself; but it is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose."

After commenting on several cases, the court further said: "The cases herein cited are of value to us in this case in that they indicate the propriety of applying to the phrase 'personal property' a limited and restricted meaning and operation, consistent with the testatrix' evident intention."

In Estate of Combs, 136 Cal.App. 286, 28 P.2d 711, 713, it is said: "Furthermore, as the respondent contends, we see no violation of the provisions of section 106 of the Probate Code. That rule commands us to take the words of the will 'in their ordinary and grammatical sense. * * *' The trial court did so. Because the statute defines the words 'personal property' the appellant contends that the statutory definition is the ordinary meaning. In that assumption she begs the question. The words 'personal property' have many meanings. 'Although popularly the term personal property is used in a somewhat restricted sense to include only goods and chattels, tangible things, the subjects of personal use, in its broad and general sense it includes everything which is the subject of ownership not coming under the denomination of real estate. * * *' 50 C.J. 760. The broad meaning happens to coincide with the statutory definition. [3] When under such circumstances a court is construing the meaning of a will it will not be confined to an examination of the meaning of the words used in one particular sentence without regard to other sentences contained in the will. But it will consider all of the sentences and when possible give some force and effect to each one. Probate Code, § 103. That rule is peculiarly applicable to a holographic will."

In Estate of Puett, 1 Cal.2d 131, 33 P.2d 825, 826, the court said: "It is generally recognized that a testamentary instrument is to be examined with a view to discover-

ing the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases, and provisions is to be subordinated to this scheme, plan or dominant purpose. The technical import of words should not prevail over the obvious intent of the testator."

In Estate of Cowden, 10 Cal.App.2d 481, 51 P.2d 1165, 1166, the court said: "There is direct authority for the determination of the trial court that the personal property given to the brother should be limited to the personal effects of the deceased. Estate of Norrish, 135 Cal.App. 166, 26 P.2d 530; Estate of Combs, 136 Cal.App. 286, 28 P.2d 711. In each of these cases the words 'personal property' were so construed. In the latter case it was pointed out that the words 'personal property' taken in the popular sense may mean only goods and chattels which are the subject of personal use, while in a legal sense they embrace all classes of property except real property, and it was held that the former definition should be accepted because the will as a whole showed that the words were not used in their more comprehensive sense."

Under these established rules, the trial court was justified in interpreting the disputed clause of this will as giving to Mrs. Eaton only the personal effects of the testatrix and in refusing to give to her all of the personal property, as defined by the code, left by the deceased. It is apparent that the testatrix did not use both the word "property" and the words "personal property" in their legal and technical sense. This being true, it is hardly reasonable to suppose that she intended to give to either of these expressions its strict legal meaning. After providing that all of her property is to be sold and disposed of in a certain manner she proceeds to describe her property, both real and personal, and states where the various items of property and some of the evidence of ownership may be found. It appears that her personal property, which is thus described or particularly mentioned in the will, was of a value about equal to that of her named real property and it is a natural inference, from the language used and the place where these matters appear in the will, that she intended to include both of these classes in the property to be sold, and to which she refers as "all my property".

She then refers to "my personal property" which is "to be given to" the appellant "for her to distribute". In speaking of this personal property which is to be given to the appellant she does not describe the same or tell where it is to be found and does not even make an outright gift of it to the appellant, but provides that it is "to be given" to her "to distribute". The latter clause indicates that the personal property thus to be given to the appellant is something other than the personal property theretofore specifically mentioned in the will, which seems to have been included in the property which was to be sold. It would be somewhat out of the ordinary for a testatrix to provide that bank accounts, building and loan certificates of deposit and shares of stock should be given to another for the purpose of distributing the same without providing to whom they should go. It would be more natural for a testatrix to do this with respect to her clothing, ornaments and other small articles which are usually considered as personal effects. From the context, it is reasonable to suppose that this testatrix had her personal effects in mind when she wrote the paragraph of the will in question, and that she intended thereby to give such articles to the appellant.

This interpretation gives effect to all clauses in the will. Taken in its entirety, the will indicates an intention on the part of the testatrix to provide for and set up a general scheme, whereby all of her property which was described or located should be sold and applied as set forth in the first paragraph of the will and whereby her personal effects, which were either too numerous or of too little value to justify specific mention, were to be turned over to the appellant to be distributed by her. The interpretation placed upon the will by the trial court must be sustained.

The judgment is affirmed.

We concur: MARKS, J; GRIFFIN, J.

39 Cal.App.2d Supp. 771

**PEOPLE v. WAHL.**

**No. Cr. A 1664.**

Appellate Department, Superior Court, Los Angeles County, California.

March 25, 1940.

**1. Fraud ⇐68**

Under statute prohibiting advertising containing any statement which is "false" or "untrue" in any respect or which is "deceptive" or "misleading", a violation of statute may be committed by making statements which are merely misleading, or which tend to lead astray or into error without any specific intent to deceive, since the statute couples the adjectives by the disjunctive "or". Pen.Code, § 654a.

The word "false" sometimes connotes an intent to deceive, and the word "deceptive" does not always imply such an intent, but no such intent is implied in the word "misleading". "Mislead" means to lead into a wrong way or path; to lead astray; to cause to err; to deceive. Deceptive means to deceive, having power to mislead. That is "misleading" which either with or without intention leads into error especially of judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "False", "Untrue", "Deceptive", "Misleading", "Or".

**2. Fraud ⇐68**

An advertisement reading "Special sale Firestone Convoy tubes 50% off regular first-line tube list price" was "misleading" within statute which prohibits advertising containing any statement which is deceptive or misleading, where convoy tubes were not first-line but third-line tubes, since natural tendency of advertisement was to cause the reader, if he knew no more than the advertisement told him, to believe that convoy tubes were first-line tubes and were to be specially sold at 50 per cent. off regular list price therefor. Pen.Code, § 654a.

**3. Fraud ⇐69**

In prosecution for making deceptive or misleading advertisement, jury were not bound to accept defendant's statement that he did not read misleading part of the advertisement. Pen.Code, § 654a.

**4. Fraud ⇐68**

Defendant could not escape responsibility for violation of statute which prohibits advertising containing any deceptive or misleading statement, because others wrote the advertisement and defendant acted on orders of his superiors in causing it to be published. Pen.Code, § 654a.

**5. Criminal law ⇐730(1)**

In prosecution for causing advertisement containing deceptive and misleading statements to be published, prosecuting attorney's suggestion, in argument, that defendant's employer was not being prosecuted because it could not be reached, was improper but did not result in "miscarriage of justice", since it would not arouse any prejudice against defendant and the court's instruction to disregard it should have averted from defendant any harmful result. Pen. Code, § 654a.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

**6. Criminal law ⇐719(3)**

In prosecution for causing publication of advertisement containing deceptive and misleading statement, prosecuting attorney's statement, in argument, regarding effect of the advertisement in misleading him personally was a statement of his personal opinion that the advertisement was misleading and improper but could not have led the jury to a verdict they would not otherwise have reached. Pen.Code, § 654a.

---

Appeal from Municipal Court of Long Beach; Wilber F. Downs, Judge.

Philip Wahl was convicted of violating Penal Code, section 654a, which prohibits advertising containing any statement which is false or untrue in any respect or which is deceptive or misleading and which is known or which by exercise of reasonable care should be known to be false or untrue, deceptive, or misleading and he appeals.

Affirmed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

Lyman B. Sutter, City Pros., of Long Beach, for respondent.

SHAW, Presiding Judge.

[1] Section 654a of the Penal Code prohibits advertising containing any statement which "is false or untrue, in any respect, or which is deceptive or misleading, and which is known, or which by the ex-

ercise of reasonable care should be known, to be false or untrue, deceptive or misleading." The controlling words here are: False, untrue, deceptive, misleading. Whatever construction may be put, in this statute, on the word "false," which sometimes connotes an intent to deceive and sometimes does not (25 Corpus Juris 436; People v. Wong Fook Sam, 1905, 146 Cal. 114, 118, 79 P. 848), or on the word "deceptive," which does not always imply such an intent (see Webster's Dictionary quoted below), no such intent is implied by the word "misleading." Turning to Webster's New International Dictionary, 1938 ed., we find the following definitions: "Mislead: To lead into a wrong way or path; to lead astray; to cause to err; to deceive." "Deceptive: Tending to deceive; having power to mislead." Under the word "Fallacious" appear the following definitions distinguishing somewhat synonymous words: "That is misleading which either with or without intention leads into error, especially of judgment. Deceptive * * * does not always imply intent to deceive." Since the statute couples the adjectives above quoted from it by the disjunctive "or", it is manifest that a violation of it may be committed by making statements which are merely misleading, that is, tend to lead astray or into error, without any specific intent to deceive, and it has been so held on a like statute. State v. Beacon Pub. Co. 1935, 141 Kan. 734, 42 P.2d 960, 964.

[2] The advertisement here in question is of that class. It reads: "Special sale Firestone Convoy tubes 50% off regular first-line tube list price." The natural tendency of this was to cause the reader, if he knew no more than the advertisement told him, to believe that Convoy tubes were first line tubes and were to be specially sold at 50% off regular list price therefor. The fact was that Convoy tubes were not first line but third line tubes, contrary to the implication from the advertisement. The advertisement, although literally true, was nevertheless deceptive and misleading in its implications and this is sufficient to bring it under the ban of the statute. The fact that a Firestone dealer, or other person who knew the whole truth, would not be led astray by it does not make it lawful. None of the advertising described in the statute, even though utterly false, could harm one who knew the truth, but such laws are passed to protect the general public who read advertisements and are likely to know nothing of the facts, not the dealers who publish them or other experts on their subject matter.

[3, 4] The defendant knew the facts, and he caused the advertisement to be published. Its misleading character appears on applying its words to the facts. Hence the jury properly found that defendant either knew or by reasonable care should have known that character. They were not bound to accept his statement that he did not read this part of the advertisement. Neither can defendant escape responsibility because others wrote the advertisement and he acted on the orders of his superiors in causing it to be published. Such facts are no defense to a charge of crime.

[5, 6] While we agree with defendant that the prosecuting attorney was guilty of misconduct in his argument, we cannot see how it has resulted in any miscarriage of justice. The suggestion that defendant's employer was not being prosecuted because it could not be reached does not seem one which would arouse any prejudice *against* him, and certainly the court's instruction to disregard it should avert from him any such harmful result. The prosecutor's statement about the effect of the advertisement in misleading him personally was, as made, a statement of his personal opinion that the advertisement was misleading, and while it was improper, we do not think it can have led the jury to a verdict they would not otherwise have reached. See People v. Zirbes, 1936, 6 Cal.2d 425, 429, 57 P.2d 1319; People v. Chilcott, 1937, 18 Cal.App.2d 583, 589, 64 P.2d 450.

The judgment is affirmed.

We concur: BISHOP, J.; SCHAUER, J.

**KNAPP v. KNAPP et ux.**

**L. A. 17114.**

Supreme Court of California.

March 26, 1940.

Rehearing Denied April 25, 1940.

**1. Trusts ⇐371(3)**

Allegations that record title to realty owned by plaintiff and his brother in equal undivided shares was taken in name of brother and his wife, and that brother and wife took record title to plaintiff's undivided one-half interest as trustees for plaintiff, did not show a "resulting trust," but, in absence of a special demurrer, would be sustained as sufficient to allow proof of an "express trust".

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust" and "Resulting Trust".

**2. Trusts ⇐289**

While a trust remains in effect there is a continuing duty on the part of the trustee to account to beneficiary.

**3. Limitation of actions ⇐102(11)**

The statute of limitations does not ordinarily begin to run upon a cause of action by beneficiary against trustee for an accounting until trust is terminated.

**4. Limitation of actions ⇐21(1), 37(2), 39(11)**

Where beneficiary delayed in challenging accounting made by trustees for more than 20 years after trust had been terminated by sale of realty held in trust, right to accounting was barred by statute of limitations. Code Civ.Proc. § 338, subd. 4; § 339, subd 1; § 343.

**5. Limitation of actions ⇐177(3), 179(2)**

A plaintiff who sues to recover damages for fraudulent representations made more than three years prior to commencement of his action is required to affirmatively plead that he did not discover the facts constituting fraud until within the statutory period of limitation and must allege when and how the facts concerning the fraud became known to him, and that he had no notice or means of knowledge which, if followed by inquiry, would have shown the true facts, but rule is relaxed in cases involving confidential relationships, the form of the action being immaterial. Code Civ.Proc. § 338, subd. 4.

**6. Limitation of actions ⇐100(13)**

An action by a beneficiary for alleged fraud committed by trustees, who were brother and sister-in-law of beneficiary, in representing that property held in trust was sold for an amount much less than received and in inducing beneficiary to accept note for such amount, was not barred by limitations, where action was brought within three years of actual discovery of fraud by beneficiary, who was not chargeable with what he would have discovered if inquiry were made, prior to actual discovery of fraud, in view of confidential relation between trustees and himself. Code Civ.Proc. § 338, subd. 4.

**7. Limitation of actions ⇐100(13)**

A family connection alone is not sufficient to support a finding of confidential relationship, so that plaintiff would not be chargeable with what he would have discovered if inquiry were made, prior to actual discovery of fraud, but it may be considered with other evidence upon such issue.

**8. Abatement and revival ⇐8(2)**

An action for an accounting of moneys realized from sale of interest in land allegedly held in trust for plaintiff, in which it was alleged that defendants fraudulently represented that property was sold for an amount much less than received and induced plaintiff to accept note for such amount, was not required to be abated because of previous suit upon the note, since the causes of action were not the same.

---

In Bank.

Appeal from Superior Court, Imperial County; Ray D. McPherrin, Judge.

Action by John H. Knapp against Charles W. Knapp and Florence R. Knapp, his wife, for an accounting and exemplary damages and costs. From a judgment sustaining a demurrer to the amended complaint, without leave to amend, the plaintiff appeals.

Judgment reversed with directions.

Prior opinion, 93 P.2d 189.

Ray D. Johnson, of El Centro, and Cyril F. Marelia and William T. Eckhoff, both of San Francisco, for appellant.

Childers & Roberts, of El Centro, for respondents.

EDMONDS, Justice.

The appellant asserts that he has a cause of action for the recovery of his share of the proceeds from the sale of certain real estate once owned by him and his brother, Charles W. Knapp, one of the respondents. He sued to secure an accounting and exemplary damages. The demurrer to his complaint was sustained without leave to amend, and the judgment appealed from followed that order.

The amended complaint alleges the following facts: The appellant and Charles W. Knapp are brothers. In 1911 they were the sole owners, in equal undivided shares, of certain real property, record title to which was taken in the names of the brother and his wife, who took the title to the appellant's undivided one-half interest as trustee for him. Shortly thereafter the appellant left California and since has not been in the state.

About January 1, 1917, the respondents represented to the plaintiff, who was then in Illinois, that they had sold the property for the sum of $4,000 and forwarded to him a promissory note for $2,000 endorsed across the face: "In full settlement for J. H. Knapp's interest in Cucamonga Cal. orange grove which was owned by payer and payee hereto." According to its terms, the holder might extend the time of payment without notification to the maker.

By other allegations, the appellant charges that he believed these representations and accepted the promissory note. However, as he now knows, the representations were in fact untrue, and the note was sent to him as part of a fraudulent scheme on the part of the respondents to abscond with the money realized from his interest in the sale of the property from which they realized more than $10,000. The true facts concerning the sale of the land were only discovered by him about October 1, 1938, during the preparation for trial of a suit upon the promissory note. Until that time, he says, he had "no knowledge, information or suspicion of the falsity of said representations, nor of the existence of any of the facts or circumstances in connection with the transaction * * *".

In addition to the demand for an accounting, the appellant asks judgment for $20,000 as exemplary damages.

The respondents demurred upon a number of grounds. They specify that the action is barred by section 338, subdivision 4, section 343, and section 339, subdivision 1, of the Code of Civil Procedure; that the plaintiff has been guilty of laches; that there is another suit pending between the same parties for the same cause; and that there is a misjoinder of parties defendant, in that it appears from the complaint that Florence R. Knapp never had any interest in the property. As against these contentions, the appellant asserts that in the case of a voluntary trust, the statute of limitations does not commence to run until the equitable owner acquires knowledge of its repudiation, and that mere lapse of time does not affect the rights of the equitable owner. He also maintains that the three-year statute limiting action for fraud or mistake has not run upon his cause of action because he filed suit within ten days after his discovery of the facts constituting the fraud.

The respondents assert that the demurrer was well taken because the complaint shows no excuse for the delay in bringing the action. They point out that there is no direct allegation that appellant had any confidence in his brother, and that his recitals concerning his reliance upon his brother because of family relationship refer only to his acceptance of the note in 1917. They also assert that the complaint does not state a cause of action upon the theory of a resulting trust because there is no allegation that the appellant ever paid any part of the consideration for the property in which he now claims an interest. Further, they say, that so far as appears in the complaint, the property may have been sold at a loss. Another point raised in support of the demurrer is that there is no offer on the part of the appellant to do equity.

[1] According to the allegations of the complaint, "on or about February 14th, 1911, plaintiff and defendant Charles W. Knapp became and were the sole owners, in equal undivided shares, of certain real property and * * * that the record title to said real property was taken in the names of defendants; that defendants and each of them took such record title to plaintiff's undivided one-half interest therein, the income therefrom and to the proceeds thereof in trust and as trustees for plaintiff". These allegations fall far short of the facts from which the law will imply a resulting trust (Woodside v. Hewel, 109 Cal. 481, 42 P. 152; Simpson v. Gillis, 1 Cal.2d 42, 32 P.2d 1071), but in the absence of a special demurrer may be sustained as

sufficient to allow proof of an express trust made for the benefit of the appellant as trustee.

However, such pleading is not to be commended, particularly in the statement of a cause of action based upon transaction occurring more than twenty-five years ago; it adds difficulties and delay to litigation and tenders issues framed with scant facts. One who has a cause of action should frankly state the facts upon which he relies and not bring them out of a fog of doubt and uncertainty only if required by the lash of a special demurrer.

[2-4] But if the respondents were ever trustees for the benefit of the appellant, that relationship terminated when the trust property was sold. The appellant knew of the sale. A note was given to him representing the amount which the trustees claimed was his share of the proceeds. At any time before the termination of the trust, the appellant could have demanded an accounting, because while the trust remains in effect there is a continuing duty on the part of the trustee to account (Lezinsky v. Mason Malt W. Co., 185 Cal. 240, 196 P. 884; Benoist v. Benoist, 178 Cal. 234, 172 P. 1109; Pearl v. Pearl, 177 Cal. 303, 177 P. 845; Lamb v. Lamb, 171 Cal. 577, 578, 153 P. 913; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232; Norton v. Bassett, 154 Cal. 411, 97 P. 894, 29 Am. St.Rep. 162), and the statute of limitations does not ordinarily begin to run upon a cause of action until it is terminated. Marston v. Kuhland, 151 Cal. 102, 90 P. 188; Chapman v. Bank of California, 97 Cal. 155, 31 P. 896. But not having taken any steps for more than twenty years to challenge the accounting made by the trustee, the statute of limitations has run upon that cause of action.

However, his complaint goes further than one for an accounting. The respondents are charged with having made fraudulent representations inducing him to accept a note for $2,000 although the property was sold for a sum in excess of $10,000. These allegations assert a cause of action which it is claimed did not accrue until the discovery of the facts concerning the fraud. Sec. 338, Code Civ.Proc.

[5] The form of such action is immaterial. Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093. But a plaintiff who sues to recover damages for fraudulent representations made more than three years prior to the commencement of his action is required to affirmatively plead that he did not discover the facts constituting the fraud until within the statutory period of limitation. He must also allege when and how the facts concerning the fraud became known to him. A further element of his cause of action is a statement of facts showing that he had no notice or means of knowledge which, if followed by inquiry, would have shown the true facts. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740. However, the latter requirement has been relaxed in cases involving confidential relationship, because facts which would justify investigation in the ordinary case would not excite suspicion where the circumstances show a right to rely upon the representations of another and the same degree of diligence should not be required. Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; Tarke v. Bingham, 123 Cal. 163, 55 P. 759; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St. Rep. 219.

[6, 7] The appellant is entitled to the benefit of this exception to the general rule. As has been stated, the allegations of the complaint are unsatisfactory, but they charge that for some years the respondents were the trustees of an express trust in his favor. One of their duties in that relationship was to honestly account for the trust property; and the appellant was entitled to rely upon their report to him without making any independent investigation. Moreover, although family connection alone is not sufficient to support a finding of a confidential relationship, it may be considered with other evidence upon that issue. Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767; Odell v. Moss, 137 Cal. 542, 70 P. 547.

[8] Nor is the plea of another action pending available to the respondents as a ground for their demurrer. The suit alleged to have been previously brought is said to be one upon the promissory note. This is not the same cause of action as the one here sued upon and does not constitute a bar to it.

Because of these conclusions, the other points made by the respondents do not re-

quire discussion. The judgment is reversed with directions to overrule the respondents' demurrer and allow them to answer.

We concur: WASTE, C. J.; GIBSON, J.; SHENK, J.; CARTER, J.; CURTIS, J.

I concur in the judgment: HOUSER, J.




15 Cal.2d 250

**FUNK v. CAMPBELL et al.**

**L. A. 17318.**

Supreme Court of California.

March 28, 1940.

**1. Appeal and error ⇐110, 782**

An order denying motion for new trial was not an "appealable order", and appeal therefrom would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

**2. Appeal and error ⇐113(1)**

Where defendants' motion to vacate judgment for plaintiff was made pursuant to statute specifying as sole ground of such motion incorrect or erroneous conclusions of law not consistent with or not supported by findings of fact, defendants could appeal from order denying the motion. Code Civ. Proc. §§ 663, 663a.

In Bank.

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by N. Funk against Mary A. Campbell, a widow, and Isabella Campbell, a single woman. From a judgment for plaintiff and an order denying defendants' motion to set aside the judgment, defendants appeal. On motion to dismiss appeal.

Motion denied.

Robert Cockins, of Santa Monica, for appellants.

Bender & Cullinan, of Los Angeles, for respondent.

SHENK, Justice.

Motion to dismiss appeals.

Judgment was entered in this action on July 12, 1939, in favor of the plaintiff. On July 18, 1939, the defendants filed a notice of motion to vacate and set aside the judgment and to enter a new and different judgment, on the ground that the conclusions of law were incorrect and erroneous and not consistent with or supported by the findings of fact. The motion was denied and the defendants appealed from the order denying the same. They also appealed from an order denying their motion for new trial.

The motion to dismiss is made on the grounds, (1) that an appeal does not lie from an order denying a motion for a new trial and (2) that an appeal does not lie from an order denying a motion to set aside a judgment when the grounds of such motion existed prior to the entry of the judgment. And it is stated that such grounds existed in this case.

[1] The order denying the motion for a new trial was not appealable and the appeal therefrom should be dismissed.

In support of her motion to dismiss the appeal from the order denying the motion to vacate, the plaintiff relies on the well-established rule that an appeal will not lie from an order refusing to vacate a judgment if the grounds upon which the party sought to have the same vacated existed before the entry of the judgment and were available on appeal from the judgment. The rule is stated in Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Estate of Siemers, 202 Cal. 424, 261 P. 298; Reynolds v. Reynolds, 191 Cal. 435, 216 P. 619, and numerous other cases to like effect.

[2] But the rule and cases relied on by the plaintiff have no application to the appeal now under consideration. The motion to vacate was made pursuant to section 663 of the Code of Civil Procedure, which specifies as the sole ground of such a motion, "Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact." A specific and separate appeal from an order made on a motion under that section is accorded the aggrieved party by section 663a of the same code and the decisions construing that section. Appeals from orders made under section 663 are set apart from and are made an exception to the rule relied on by the plaintiff. California Delta Farms

v. Chinese American Farms, 201 Cal. 201, 255 P. 1097. This subject is fully discussed in our opinion in the case just cited and that case is sufficient authority for the denial of the second part of the plaintiff's motion.

The appeal from the order denying a new trial is dismissed. The motion to dismiss the appeal from the order denying the motion to vacate is denied.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; GIBSON, J.; HOUSER, J.

CARTER, Justice (concurring).

I concur in the conclusion reached in the opinion of Mr. Justice Shenk but desire to amplify my views on the proposition here involved in order to avoid confusion in the future.

On July 12, 1939, findings of fact and conclusions of law were filed and judgment entered in this action in favor of plaintiff, in the superior court of Los Angeles county. On July 18, 1939, appellants filed a "notice of motion to set aside judgment" on the ground that the conclusions of law were incorrect and not supported by the findings of fact and that judgment be entered in favor of the defendants Isabella D. Campbell and Donald Campbell. This motion was subsequently made and denied on August 25, 1939. Notice of appeal from the order denying the defendants' motion to set aside the judgment and for a new trial was filed August 30, 1939. A transcript on appeal was thereafter prepared and filed in this court on October 6, 1939. The appeal is taken on the judgment roll alone.

Respondent has moved to dismiss the appeal upon the ground that no appeal lies from an order denying a motion to set aside a judgment when the grounds of such motion existed prior to the entry of said judgment.

In support of his motion to dismiss the appeal from the order denying appellants' motion to vacate the judgment, respondent relies upon the following cases: Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Barry v. Learner, 113 Cal.App. 651, 299 P. 82; Barker v. Ackers, 29 Cal.App.2d 162, 84 P.2d 264; Nagelmann v. McIntyre, 27 Cal.App.2d 621, 81 P.2d 466; Reynolds v. Reynolds, 191 Cal. 435, 216 P. 619. These cases lay down the rule that an appeal does not lie from an order refusing to vacate a final judgment if the grounds upon which the party sought to have the same vacated existed before the entry of judgment and were available on appeal from the judgment. If the rule announced in the above-cited cases is applicable to the case at bar, respondent's motion to dismiss the appeal should be granted.

It is obvious from a reading of the transcript that the grounds upon which the appellants sought to have the judgment vacated existed before the entry of the judgment and are available upon an appeal from the judgment. However, there is another line of authorities upon which appellants rely which lay down a rule in apparent conflict with the rule announced in the above-mentioned cases. The authorities relied upon by appellants are: Lewith v. Rehmke, 215 Cal. 241, 9 P.2d 297; California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Estate of Barton, 20 Cal.App.2d 648, 67 P.2d 695; Progressive Finance Corporation v. Vining, 115 Cal.App. 423, 425, 1 P.2d 1004; Karsh v. Superior Court, 124 Cal.App. 373, 12 P.2d 658; Los Angeles Soap Company v. Bossen et al., 122 Cal.App. 237, 9 P.2d 900; Westervelt v. McCullough, 64 Cal. App. 362, 221 P. 661; Condon v. Donohue, 160 Cal. 749, 118 P. 113; Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas. 1912C, 50.

The cases last cited hold that an appeal lies from an order denying a motion made under sections 663 and 663a of the Code of Civil Procedure to vacate a judgment upon the assumption that such an order is a special order made after final judgment and expressly made appealable as such under section 963 of the Code of Civil Procedure.

It is obvious that confusion has existed in the minds of those who have attempted to apply the rules laid down in the two lines of authorities above cited. This confusion is the result of some rather loose language used in the opinions in the group of cases first cited in describing the character of the order appealed from in those cases: It does not appear in the opinion in any of those cases that the order appealed from was the basis of a motion presented to the trial court pursuant to sections 663 and 663a of the Code of Civil Procedure. Each of said motions was made after the judgment in each of said cases had become final, and there was no legal basis upon which said motions could

be made. The respective judgments in said cases were immune from direct attack at the time said motions were made. Appellants in those cases sought to maintain their appeals by contending that they were taken from orders made after final judgment pursuant to section 963 of the Code of Civil Procedure. However, instead of holding in those cases that the order appealed from therein was not appealable because there was no legal basis upon which the motion could have been made in the trial court, the court in those decisions held that an appeal did not lie from said orders because the grounds upon which the party sought to have the judgments vacated existed before the entry of judgment and were available on an appeal from the judgment. If this rule were applied to an appeal from an order denying a motion to vacate a judgment under sections 663 and 663a of the Code of Civil Procedure, the result would be that substantially all of the appeals taken from orders denying motions to vacate judgments would have to be dismissed, because it is usually the situation that the grounds upon which the party seeks to have the judgment vacated existed before the entry of judgment and are reviewable on appeal from the judgment. Such is the situation in the case at bar.

However, in the list of authorities holding that an appeal will lie from an order granting or denying a motion to vacate a judgment under the provisions of sections 663 and 663a of the Code of Civil Procedure, it is held that a party aggrieved by such order may appeal therefrom even though the grounds upon which he sought to have the judgment vacated existed before the entry of the judgment and were available on an appeal from the judgment. It is obvious that there is a direct conflict in the reasoning in these two lines of authorities.

While it is impossible to harmonize this conflict, I may be able to clarify the situation by a pronouncement which may be helpful in guiding those who might otherwise be baffled by the confusion which now exists.

I think it was the obvious intention of the legislature that an appeal should lie from an order granting or denying a motion to vacate a judgment made pursuant to sections 663 and 663a of the Code of Civil Procedure, regardless of whether the grounds upon which said motion is made existed before the entry of judgment and are available on an appeal from the judgment, and that such an appeal lies notwithstanding an appeal is also taken from the judgment.

I think it proper to point out, however, that there is no basis in our law for a motion to vacate or set aside a judgment regular on its face, which has become final by reason of the time for appeal having expired, except in the field of default under section 473 of the Code of Civil Procedure, and all such motions are abortive. Such being the situation, it is obvious that when such motions are made and denied and appeals are taken therefrom, the appeal should be dismissed upon the ground that there was no legal basis for the motion which resulted in the making of the order, and consequently no basis for an appeal from such order, and not upon the ground that the order is not appealable because the grounds upon which the motion was made existed before the entry of judgment and were available on an appeal from the judgment. Such is the class of orders from which appeals were taken in the list of authorities upon which respondent is relying in the case at bar.

In view of the factual situation stated at the beginning of this opinion, it is obvious that the motion to set aside the judgment which was made by appellants in the trial court in the case at bar was made pursuant to the provisions of sections 663 and 663a of the Code of Civil Procedure, and therefore the order denying same is appealable even though the grounds upon which said motion was made existed before the entry of the judgment in said action and were available on appeal from the judgment, and therefore respondent's motion to dismiss the appeal in this case should be denied.

While defendants' notice of appeal states that they are also appealing from an order denying them a new trial, the record does not disclose that a motion for a new trial was made, hence, this statement in the notice of appeal is surplusage and may be disregarded.

15 Cal.2d 220

## LAWRENCE et al. v. I. N. PARLIER ESTATE CO. et al.

L.A. 17214.

Supreme Court of California.

March 21, 1940.

1. Corporations ⇐283(3)

An action under statute contesting the election of any director of a corporation is in the nature of an equitable proceeding, in which the court will consider all the matters necessary to a proper determination of the validity of the contested election and also all matters necessary to a just direction of the relief required in each instance. Civ. Code, § 315.

2. Corporations ⇐197

Under statute providing that only persons in whose names shares entitled to vote stand on corporation's stock records shall be entitled to vote at shareholders' meeting, stock records are conclusive on election officers with respect to the right to vote provided the shares are valid and entitled to recognition as the records disclose. Civ. Code, § 320a.

3. Corporations ⇐197

The statute providing that only persons in whose names shares entitled to vote stand on corporation's stock records shall be entitled to vote at shareholders' meeting was enacted to relieve election officers from having to determine at every election who may vote shares claimed by more than one stockholder or the validity of claims of others whose right to vote is challenged, and it was not intended to decide conclusively the right to vote stock irrespective of method by which recitations of stock ownership on books were procured. Civ.Code, § 320a.

4. Corporations ⇐171

A corporation's stock records are not conclusive on the courts with respect to the ownership of stock. Civ.Code, § 320a.

5. Corporations ⇐283(3)

In a statutory action by a shareholder contesting an election of corporate directors for invalidity, all factors requisite to a determination of the legality of the election will be reviewed, including, where necessary, the question whether certain votes were properly cast. Civ.Code, § 315.

6. Corporations ⇐123(4)

It is not necessary to a valid pledge of corporate stock that a transfer on the books of the corporation be made.

7. Corporations ⇐123(4, 7, 10)

A pledgee of corporate stock, even though the pledge is not entered on the corporation's books, becomes vested with a legal interest or special property therein, and the stock certificate assigned to him is recognized as evidence of right and ownership and confers on the legal holder thereof the right to protect that interest.

8. Corporations ⇐123(4)

It was not essential to the validity of the pledge of corporate stock that the stock certificate be canceled, reissued by the corporation, and registered in the name of the pledgee's trustee.

9. Corporations ⇐123(4)

A pledgee of corporate stock has a right to register the shares to himself when he holds the stock certificate by proper indorsement or assignment, but he may contract not to exercise that right.

10. Corporations ⇐197

Under statute a pledgee of corporate stock may vote the pledged shares at a shareholders' meeting only if they have been registered in his name. Civ.Code, § 320b.

11. Corporations ⇐123(1)

A pledge of corporate stock need not be in writing or expressed, but it may be implied from the facts and circumstances of the case. Civ.Code, §§ 320b, 2987.

12. Corporations ⇐197

Where a family corporation over a period of years permitted shareholders who pledged their stock to corporation as security for loans to vote stock, and trustee holding stock pledged by one shareholder without direction from board of directors and without notice to that shareholder caused cancellation of stock certificate and issuance of a certificate to himself as trustee, that shareholder was entitled to vote stock owned by him at special shareholders' meeting. Civ.Code, § 320b.

13. Corporations ⇐307

The powers of officers and directors of a corporation must be exercised in good faith and with a view to the best interests of the shareholders as well as of the corporation.

**14. Corporations ⇐314(1)**

A corporation's director holding as trustee stock certificates pledged to corporation was not authorized so to manipulate certificates as to gain any personal advantage to himself to the detriment of the corporation or its stockholders or the owners of the pledged stock.

**15. Corporations ⇐307**

A corporate director acts in a fiduciary capacity, not only towards the corporation itself, but also towards the stockholders.

**16. Corporations ⇐307**

Corporate directors are intrusted with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by accepting the office the directors preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with the duty they owe to the stockholders and from making any use of their power of the corporate property for their own advantage.

**17. Corporations ⇐197**

A corporation cannot vote either directly or indirectly stock which it owns.

**18. Corporations ⇐197**

The Legislature, by enacting statute providing that shares of stock standing in the name of any person as pledgee, trustee, or other fiduciary may be voted only by such pledgee, trustee, or other fiduciary, did not intend to change the rule that a corporation cannot vote directly or indirectly stock which it owns. Civ.Code, § 320b.

**19. Corporations ⇐123(4, 7), 197**

A pledgor of corporate stock retains the ownership of his stock, and the pledgee has a mere lien thereon, but under statute the pledgee may register as such and secure thereby the right to vote the stock. Civ. Code, § 320b.

**20. Corporations ⇐197, 198**

Where a person or corporation has the same identity as one registered as a shareholder on corporate books, the person or corporation should not be denied the right to vote because of a mere change in name, and hence a married woman whose stock was registered in her maiden name was entitled to have her stock voted by her proxy.

**21. Corporations ⇐197**

Where corporate stock was originally issued and remained on corporation's records in name of a corporation which merged with another corporation, the merged corporation was entitled to vote the stock at a special meeting in 1938, particularly where merged corporation voted stock without objection from date of merger in 1930 until date of special meeting, all shareholders knew of merger, and merged corporation was recognized in the minutes of numerous meetings as among shareholders present. Civ. Code, § 361, subd. (7).

**22. Corporations ⇐194**

Notice of a special shareholders' meeting, stating that all questions relating to property, management, and business policy would be considered and that such action as might be deemed expedient and necessary in connection therewith would be taken, was sufficient to notify shareholders that the consideration might involve a change of officers and directors.

---

In Bank.

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Action by Lula G. Lawrence and others against the I. N. Parlier Estate Company and others, to determine the legality of the removal of five previous elected members and the election of three members of the board of directors of the I. N. Parlier Estate Company. From an adverse judgment, defendants appeal.

Affirmed.

For prior opinion, see 92 P.2d 917.

Hayhurst & Gibson, of Fresno, for appellants.

W. M. Conley, Philip Conley, Matthew Conley, R. Z. Lamberson, and Conley, Conley & Conley, all of Fresno, for respondents.

CARTER, Justice.

This is an appeal by defendants from a judgment of the superior court of Fresno county in an action brought pursuant to section 315 of the Civil Code to determine the legality of the removal of five previously elected members, and the election of three new members of the board of directors of the I. N. Parlier Estate Company, at a special meeting of the stockholders of said company.

The I. N. Parlier Estate Company is a California corporation, organized in 1915 by I. N. Parlier and members of his family. The properties of said corporation consist

principally of valuable vineyards situated in the San Joaquin valley. Since the death of I. N. Parlier, the major portion of the company's stock has remained in the hands of members of his family and the company has been under the management of C. A. Parlier, a son of I. N. Parlier.

A special meeting of shareholders was called by the board of directors for October 15, 1938, at the written request of two of the shareholders under the provisions of section 313 of the Civil Code.

At the time of said meeting, the company had issued 2499⅓ shares of its capital stock. Nora Ousterhoudt, the owner of 415⅔ of said shares, had died and in the probate of her estate this stock had been distributed to the corporation. It was agreed by all parties that this stock, being owned by the corporation itself, assumed the status of treasury stock and could not be voted at a shareholders' meeting. It was found by the trial court that Bessie N. Parlier, formerly an owner of one share of stock, was not a shareholder at the time of the meeting. This left 2082⅔ shares of issued stock which might be represented and voted at the special meeting.

On October 15, 1938, the books of the company showed the following ownership of the issued stock: Lula G. Lawrence, 277⅔ shares; Carrie A. Thomas, 277⅔ shares; C. A. Parlier, 277⅔ shares; C. A. Parlier, as trustee for I. N. Parlier Estate Company, 275⅔ shares (the latter stock was pledged by G. W. Parlier to secure his indebtedness to the I. N. Parlier Estate Company); J. B. Parlier, 277⅔ shares; Ada Sharp, 415⅔ shares; National Bankitaly Company, 275⅔ shares; G. W. Parlier, 2 shares, and W. W. Parlier, 2 shares.

The 275⅔ shares of stock registered in the name of the National Bankitaly Company were transferred to that company by W. W. Parlier in 1927. It will here be noted that by an "agreement of merger" made October 15, 1930, the National Bankitaly Company was merged with the Corporation of America, and all the property of the former passed to the merged Corporation of America. No change in the names of the corporate owners of this stock was ever made on the books of the Estate Company, but proxies of the Corporation of America had been permitted to vote said shares of stock without objection since the date of the merger. The 277⅔ shares of stock registered in the name of Carrie A. Thomas are still owned by her although she has assumed the name of Procter since her marriage.

With regard to the stock registered in the name of C. A. Parlier, as trustee, the evidence shows that long prior to the special shareholders' meeting of October 15, 1938, G. W. Parlier, J. B. Parlier and Ada Sharp had each borrowed considerable sums of money from the I. N. Parlier Estate Company, and that each of them to secure payment of such loans, had endorsed the certificates of stock representing their shareholdings (with the exception of two shares of G. W. Parlier's stock) to the I. N. Parlier Estate Company, or to C. A. Parlier, as trustee for the I. N. Parlier Estate Company. These certificates, so endorsed, had been delivered to the company, or to C. A. Parlier to hold for the company. The G. W. Parlier stock certificate had been so endorsed and delivered in 1935. Prior thereto, the certificates of J. B. Parlier and Ada Sharp had likewise been endorsed and delivered.

No transfer on the books of the Estate Company was made as to any of this stock before July 22, 1938, and G. W. Parlier, J. B. Parlier and Ada Sharp attended annual shareholders' meetings in the years 1935, 1936, 1937 and 1938, and, at each of said meetings, voted the stock represented by the certificates standing in their respective names, without challenge or objection. On July 22, 1938, without direction from the board of directors and without notice to G. W. Parlier, C. A. Parlier caused a cancellation of the stock certificate issued to G. W. Parlier and the issuance to "C. A. Parlier, as trustee for the I. N. Parlier Estate Company", of a certificate representing the 275⅔ shares formerly held by G. W. Parlier.

At the special meeting held on October 15, 1938, the shareholders divided into two groups, which, it has been stipulated, voted against each other consistently on all measures. C. A. Parlier in his individual capacity and as trustee, J. B. Parlier, Ada Sharp and W. W. Parlier, whom we will designate as the defendant group, voted as one unit. The other shareholders, whom we will describe as the plaintiff group, voted as another unit. According to the stock books of the company, after the transfer of the G. W. Parlier stock, the defendant group represented 1249⅓ shares, and the plaintiff group 833⅓ shares.

The special meeting was called to order by the president of the company, and, as a

quorum was present, the meeting proceeded to the consideration of business. There was then presented and filed, a written request and direction to C. A. Parlier to vote all the stock held by him or standing in his name "as trustee or in any other fiduciary capacity" for the removal of all the directors of the company and thereafter to vote in favor of G. W. Parlier, Lula G. Lawrence, and E. B. Campbell as new directors. This request was signed by Lula G. Lawrence, Corporation of America by E. B. Campbell, Philip Conley and H. L. Jacobs, its proxies, Carrie A. Procter, by Lula G. Lawrence, her proxy, and G. W. Parlier.

A motion was made by C. A. Parlier to adjourn the meeting for two weeks to October 29, 1938. Again, as trustee, he was requested and directed by the plaintiff group of stockholders to vote all the stock so held by him against adjournment. The chair refused to recognize the right of the Corporation of America to vote the shares claimed by it, and refused to recognize the right of G. W. Parlier to vote more than two shares of stock, ruling that C. A. Parlier, as trustee for the I. N. Parlier Estate Company had the right to vote the other 275⅞ shares claimed by G. W. Parlier.

All of the stock of the defendant group (as of record, 1249⅛ shares) was voted in favor of the motion for adjournment. It was declared carried, the meeting was declared adjourned for two weeks and the defendant group left the meeting.

Refusing to recognize the meeting as adjourned, the plaintiff group of shareholders remained. They proceeded to elect a temporary chairman and a temporary secretary, passed a motion removing all of the then members of the board of directors, consisting of W. W. Parlier, J. B. Parlier, G. W. Parlier, C. A. Parlier, and Lula G. Lawrence, and elected Lula G. Lawrence, G. W. Parlier and E. B. Campbell as directors. At this meeting, the stock standing on the books in the name of the National Bankitaly Company was voted by the proxies of the Corporation of America, and that in the name of Carrie A. Thomas was voted by the proxy of Carrie A. Procter, formerly Carrie A. Thomas. C. W. Parlier also voted the 275⅞ shares of stock pledged by him to secure his debt to the I. N. Parlier Estate Company, and for which a certificate had been issued to C. A. Parlier as trustee, on July 22, 1938.

It is apparent that this case turns on the question of whether each of the plaintiffs herein legally had the right to vote his stock, for if any one of them did not, the motion to adjourn the meeting for two weeks to October 29, 1938, was carried, and no further business could have been transacted by the shareholders on October 15, 1938.

The trial court found that G. W. Parlier was the owner and holder and entitled to vote the 275⅞ shares pledged by him to the corporation; that the proxies of the Corporation of America had the right to vote the 275⅞ shares standing on the books of the company in the name of National Bankitaly Company and that the proxy of Carrie A. Procter had the right to vote the 277⅛ shares standing on the books of the company in the name of Carrie A. Thomas; that a special meeting of the stockholders of said corporation was duly and regularly called and held on October 15, 1938, at which meeting G. W. Parlier, E. B. Campbell and Lula G. Lawrence were elected members of the board of directors of said corporation.

Judgment was entered in favor of plaintiffs in accordance with the findings of fact decreeing that the three directors above named constitute the board of directors of said corporation and that any and all claims and assertions of defendants J. B. Parlier, C. A. Parlier, Ada Sharp, W. W. Parlier, and Bessie N. Parlier, to the contrary are without right or justification and said last-named parties are enjoined and restrained from doing any act in support or furtherance of any such claim or assertion.

In the presentation of their appeal to this court, the defendants do now, and have throughout maintained, that only persons in whose names shares stand on the stock records of the corporation on a certain designated date before a stockholders' meeting may be entitled to vote and that said stock records are conclusive. Furthermore, defendants challenge the sufficiency of the call for and notice of the meeting, claiming that a board of directors cannot be removed and new directors be elected unless the call and notice state specifically that said matter will be taken up at the meeting.

On the other hand, the plaintiffs contend that the mere surface showing of shareholders on the books of a corporation is not binding and conclusive; especially when such showing is fraudulently procured by minority shareholders to perpetuate their control of the corporation; and, that in a

proceeding under Civil Code section 315, the trial court may determine the shareholders legally entitled to vote at the election in question. Plaintiffs further contend that when a shareholder has pledged his stock to the corporation with the understanding that his stock certificate is not to be cancelled and a new one issued, a "trustee" for the corporation who has control of the books cannot secretly and fraudulently cancel said certificate and issue a new one in his own name for the purpose of controlling an election of directors. Plaintiffs also assert that a corporation cannot vote its own stock, either directly or indirectly through a trustee and thereby control the election of directors.

Since the right of G. W. Parlier to vote the stock which he had pledged to the I. N. Parlier Estate Company and which now stands on the company records in the name of C. A. Parlier, as trustee for the company, is the one most strongly disputed, we shall proceed first to a consideration of this proposition.

The provisions of the Civil Code pertaining to the origin and government of corporations were amended in 1931. Stats. 1931, p. 1762 et seq.

Section 310 of the Civil Code provides that a board of directors of a corporation "may be removed from office by a vote of shareholders holding a majority of the outstanding shares entitled to vote at an election of directors".

Section 313 of the Civil Code authorizes the calling and holding of special meetings of the shareholders.

Section 316 of the Civil Code provides that the presence of a majority of the shares entitled to vote at any meeting shall constitute a quorum for the transaction of business. After the meeting is once regularly opened with a quorum present, the withdrawal of part of the shareholders does not interfere with the power of those remaining to transact business until the adjournment of the meeting.

Section 330.1 of the Civil Code provides the manner in which title to certificates and the shares represented thereby may be transferred.

Section 320a of the Civil Code contains the following: "Subject to the provisions of sections 320b and 320c of this title, only persons in whose names shares entitled to vote stand on the stock records of the corporation on the day three days prior to any meeting of shareholders, or, if some other day be fixed for the determination of shareholders of record, then on such other day, shall be entitled to vote at such meeting."

Section 320b of the Civil Code contains the following: "(1) Shares standing in the name of any person or persons as pledgee, trustee or other fiduciary may be voted and all rights incident thereto may be exercised only by such pledgee, trustee or other fiduciary in person or by proxy, and without proof of authority."

[1] Preliminarily, we may say that an action under Civil Code section 315 is in the nature of an equitable proceeding in which the court will consider all matters necessary to a proper determination of the validity of the contested election, and also all matter necessary to a just direction of the relief required in each instance. Whitehead v. Sweet, 126 Cal. 67, 58 P. 376; Smith v. California Thorn Cordage, Inc., 129 Cal.App. 93, 102, 18 P.2d 393; Peterson v. Taggart, 1 Cal.App.2d 468, 36 P.2d 1086.

[2, 3] We recognize that under the provisions of the above-mentioned Civil Code section 320a, stock records are now regarded as conclusive upon election officers as to the right to vote, provided the shares are valid and entitled to recognition as the records disclose. 6A Cal.Jur. 852.

The purpose for which this section was enacted, however, was to relieve election officers from the embarrassing and awkward position of having to determine at every election who had the right to vote the shares of stock claimed by more than one stockholder, or the validity of the claims of others whose right to vote was challenged.

It was never intended to decide finally and conclusively the right to vote stock of a corporation irrespective of the method by which the recitations of stock ownership on the books of the corporation were procured. To so hold would be to fashion from the statute a cloak for fraud which it cannot be presumed was the legislative intendment.

[4, 5] This construction is borne out by the fact that such stock records are not conclusive on the courts as to the ownership of stock and the fact that remedies are provided by which rival claimants may litigate their disputes. 6A Cal.Jur. 852 et seq. So, also, it is provided that a shareholder may contest an election for invalidity, whereupon all factors requisite to a deter-

mination of the legality of the election will be reviewed, including, where necessary, the question of whether or not certain votes were properly cast.

The facts as to the pledge of his stock to the I. N. Parlier Estate Company to be held by C. A. Parlier, as trustee, are not disputed by G. W. Parlier. He does, however, claim that as a part of the said pledge contract it was implied that the pledged property should not be registered in the name of the pledgee or the trustee of said pledgee and that the pledgor was to retain the right to vote the stock which he owned, subject to the lien of the pledgee.

[6-8] It is elementary that every pledge has its inception in contract. Civ.Code, sec. 2987. Likewise, it is not now, and it was not under former law, essential to the creation of a valid pledge that a transfer on the books of a corporation be made. A pledgee of corporate stock, even though the pledge be not entered on the books, becomes vested with a legal interest or special property therein. The stock certificate assigned to him is recognized as evidence of right and ownership and confers upon the legal holder thereof the right to protect that interest. 6A Cal.Jur. 720. Therefore, it was not essential to the validity of the pledge in question that the stock certificate be canceled, reissued by the company, and registered in the name of its trustee.

[9-11] Of course, a pledgee has a right to register the shares to himself when he holds the certificate by proper endorsement or assignment, but we see no reason why he should not be allowed to contract not to exercise such right. And it is still the rule that a pledgee may vote the pledged shares only if they have been registered in his name (Civ.Code, sec. 320b), for if the shares be not registered to him, the pledgor remains the voting registered owner. In addition, a pledge contract need not be in writing or express, but it may be implied from the facts and circumstances of the case. 12 Fletcher, Cyclopedia Corporations, Perm.Ed., vol. 12, pp. 832, 833.

In order to sustain their contention that as part of the pledge contract an implied agreement existed that G. W. Parlier was to retain the right to vote his stock, plaintiffs point out that the conduct of the corporation over a period of years, as to all the shareholders from whom it had accepted pledges of stock, was to refrain from a cancellation and reissuance of the stock certificates and to permit such pledgors to retain their voting rights. Not only did G. W. Parlier vote his stock for three and one-half years after the last date of the renewal of his pledge, but Ada Sharp, and J. B. Parlier, the other pledgors, likewise did and still do vote the stock which they so pledged.

[12] By the finding that each of these pledgeholders retained the right to vote his own stock, the trial court in effect found such an agreement to exist. Viewing all of the circumstances surrounding this case, namely: that this corporation is a family corporation, managed and controlled principally by the members thereof; that the practice over a period of years had been to permit those who pledged their stock to the company as security for loans to vote said stock; that the only stock cancelled and reissued was that of the one pledgor whom the trustee and manager of the corporation admitted on the witness stand supported the group of stockholders opposed to him; that said cancellation was made without direction from the board of directors and without notice to said pledgor—we are constrained to agree with the trial court and sustain the finding that G. W. Parlier had the right to vote the stock which he owned at the time of the special shareholders' meeting on October 15, 1938.

[13] In this connection, we deem it well to point out that it has ever been the rule that the powers of officers and directors of a corporation must be exercised in good faith and with a view to the best interests of the shareholders as well as of the corporation.

[14] While it is not our purpose in this opinion to outline specifically what C. A. Parlier should have done with respect to the stock certificates pledged to the corporation for the purpose of protecting the rights and interests of the corporation therein, we do wish to state unequivocally that he should not have so manipulated said stock certificates as to gain any personal advantage to himself to the detriment of either the corporation or its stockholders or the owners of said stock.

[15, 16] The relationship of the director of a corporation to the corporation and its stockholders and the standard of conduct required of him has often been defined: In the case of Schwab v. Schwab-Wilson Machine Corporation, 13 Cal.App.2d 1, 3, 55 P.2d 1268, the court said: "A corporate director acts in a fiduciary capacity, not only towards the corporation itself (Cal.Jur.,

vol. 6a, p. 1100), but also towards the stockholders. As expressed in Wickersham v. Crittenden, 93 Cal. 17, 28 [29], 28 P. 788, 790: 'The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage.'"

See, also, Cooper v. Spring Valley Water Co., 171 Cal. 158, 162, 153 P. 936; Angelus Securities Corporation v. Ball, 20 Cal.App. 2d 423, 431, 67 P.2d 152; Angelus Securities Corporation v. Ball, 20 Cal.App.2d 436, 439, 67 P.2d 158.

In reviewing the evidence, we find that by way of explanation of his conduct in transferring to himself as trustee the G. W. Parlier stock only, C. A. Parlier testified that he believed that all of the pledged stock should have been reissued to himself as trustee, but that he had had time to transfer only that of the one pledgor admittedly hostile to him—and this, in spite of the fact that he had had the pledged stock in his hands for some four or five years, and did in fact transfer the G. W. Parlier stock approximately eighty-five days before the special meeting of October 15, 1938. The fact that on cross-examination C. A. Parlier admitted that he had discussed the transfer with his attorney prior to the date thereof on July 22, 1938, and that he "knew there was going to be trouble of some kind, but I didn't know what is was" completes a picture which smacks altogether too much of manipulation of stock records by an officer of the corporation for the purpose of advancing his own interests.

If there had been no implied contract not to register the pledgee's interest, and C. A. Parlier, as general manager of the company, had in good faith believed it his duty for said company's protection to register its interest as pledgee, he should have been required to do so in an impartial and equable manner and have been precluded from exercising his powers solely in the interest of keeping himself in control of the corporation. Such a standard of conduct is approved in Italo Petroleum Corporation v. Producers Oil Corporation, 20 Del.Ch. 283, 174 A. 276; Western States Life Insurance Co. v. Lockwood, 166 Cal. 185, 190, 135 P. 496; and Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788.

[17, 18] The question has been raised as to the right of C. A. Parlier, as trustee, to vote the pledged stock held by him in trust for the corporation. The conclusion which we have reached on the other issues renders it unnecessary to determine this question. However, we wish to point out that the rule has long been established that a corporation cannot vote either directly or indirectly, stock of which it is the owner (Brewster v. Hartley, 37 Cal. 15, 99 Am.Dec. 237; Ex parte Holmes, 5 Cow.,N.Y., 426; American Railway-Frog Co. v. Haven, 101 Mass. 398, 402, 3 Am.Rep. 377; 5 Fletcher Cyclopedia of Corporations, Perm.Ed., p. 152), and we do not believe that the legislature intended by its enactment of Civil Code section 320b to change this long-established rule, the obvious purpose of which is to secure honesty and fairness in the administration of corporate business.

[19] Although it is the settled rule that a pledgor retains the ownership of his stock, and that a pledgee has a mere lien thereon, it is provided by statute in this state that a pledgee may register as such and secure thereby the right to vote said stock. If stock pledged to a corporation, and held by a trustee to prevent its merger, might be registered in the name of such trustee and accorded the naked legal right to vote, since ownership remains in the pledgor subject only to said pledgee's lien, it might, by this means be possible to circumvent the rule prohibiting the voting of stock by a corporation in which it has the beneficial ownership.

The substance of the correct rule to be followed was stated by the supreme court of New York in Ex parte Holmes, 5 Cow., N.Y., 426, 434, where, under a general statute stating that shares of stock should be voted only by those in whose names it stands on the transfer books of the company at the time of an election, the court said: "No doubt the company may, from necessity, as in this case, take their own stock in pledge or payment; and keep it outstanding in trustees, to prevent its merger; and convert it to their security. But it is not stock to be voted upon within the meaning of the charter, or the general act upon which we are proceeding. It is not to be tolerated, that a company should procure stock, in any shape, which its officers may wield to the

purposes of an election; thus securing themselves against the possibility of removal."

[20, 21] We have examined and found little merit in defendant's contention that the Corporation of America was not entitled to vote its stock at the special meeting on October 15, 1938, because the stock was originally issued and remained on the company's records in the name of the "National Bankitaly Company".

With regard to the merger of the National Bankitaly Company, we wish to point out that according to section 361 of the Civil Code, subdivision (7), upon merger of two corporations, the surviving corporation "shall succeed, without other transfer, to all the rights and property of each of the constituent corporations". This lack of necessity for formal transfer is illustrated also in the case of Estate of Barreiro, 125 Cal. App. 153, 13 P.2d 1017, where it was held that even where a corporation has been nominated executor of an estate, its successor by merger succeeds to said office without further approval of the probate court or the taking of a new oath of office.

Of course, under the statute as it now stands, the better practice would be for any person or corporation to register a change of name with the proper officer in charge of the stock records of the corporation in which it is the holder of shares to obviate the possibility of dispute, but where a person or corporation has the same identity as one registered on the corporate books, said person or corporation should not be denied the right to vote because of a mere change in name. This rule applies equally to the argument that the stock registered in the name of Carrie A. Thomas should not have been voted by the proxy of Carrie A. Procter, formerly Carrie A. Thomas.

Furthermore, in the instant case, the Corporation of America voted its stock without objection from the date of its merger in 1930, until the date of the special meeting of October 15, 1938; all of the shareholders knew of the merger and the Corporation of America was recognized in the minutes of numerous meetings as among the shareholders present; the proxies presented at the meetings began "That the undersigned, Corporation of America, formerly National Bankitaly Company, does hereby * * *", and C. A. Parlier himself on at least one occasion held and voted such a proxy; in addition, representatives of the Corporation of America were permitted to examine the books of the I. N. Parlier Estate Company. There seems to be little reason in either law or equity for denying the Corporation of America its right to vote herein.

[22] We have examined the call of the special meeting which is criticized by defendants as being insufficient in that it did not state specifically that one of its purposes was to be for the election of a board of directors. The purpose of the special meeting was stated in the call and notice as follows:

"The general nature of the business to be transacted at said special meeting of the shareholders is to consider and determine all questions relating to the property, *management and business policy* of the corporation, including the property derived from the estate of Nora Osterhoudt, deceased, and the interest of the corporation in Parlier Bros., a copartnership, and to take such action as may be deemed expedient or necessary in connection therewith."

We feel no hesitancy in deciding that upon receipt of the notice stating that there would be considered at the meeting "all questions relating to the property, management and business policy of the corporation * * * and to take such action as may be deemed expedient and necessary in connection therewith", the shareholders had ample notice that such consideration might involve a change of the officers and directors responsible for such management.

The judgment of the trial court is therefore affirmed.

We concur: WASTE, C. J.; GIBSON, J.; HOUSER, J.; CURTIS, J.; SHENK, J.; EDMONDS, J.

15 Cal.2d 234

## WARD v. WARD.

L. A. 16839.

Supreme Court of California.

March 26, 1940.

**1. Appeal and error ⇐544(2)**

Where appeal was on judgment roll alone, order modifying judgment, which order was not part of the judgment roll, could not be considered.

**2. Appeal and error ⇐544(2)**

On appeal on judgment roll alone, the court is precluded from considering any matters of fact not a part of the judgment roll.

**3. Appeal and error ⇐907(3)**

On appeal on judgment roll alone, the findings are to be liberally construed and will be given a construction which will uphold, rather than defeat, the judgment.

**4. Appeal and error ⇐907(3)**

On appeal on judgment roll alone, any ambiguities or inconsistencies in the record properly before the reviewing court will be resolved in favor of sustaining the judgment.

**5. Appeal and error ⇐907(3)**

Where court originally found that husband was financially able to pay support money to wife and that wife had no income other than from community property and entered order requiring husband to pay $85 per month for that purpose, and on motion for new trial court entered order of modification striking from the judgment the provision for monthly payments but order was not set forth in full in judgment, on appeal, on judgment roll alone court assumed that there were facts before trial court when it made the modification order which would support the order and that it contained findings of fact and conclusions of law adequate to support it, as against contention that the modification order was not supported by the original findings. Code Civ.Proc. § 662.

**6. Appeal and error ⇐935(1)**

Where separate maintenance judgment stated that it had been modified by an order of a certain date by striking therefrom requirement of monthly payments for support, the reference to the modification order was sufficient to justify inference that everything was done which would render it an effectual modification of the judgment and findings and conclusions originally made and inconsistent with the modification order were not controlling.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action for divorce by Irving M. Ward against Fanny Ward, wherein the defendant filed a cross-complaint for separate maintenance. From the portion of the judgment as modified which denied defendant separate maintenance and from the order of modification, defendant appeals.

Affirmed.

I. Henry Harris, Jr., and David Schwartz, both of Los Angeles (I. Henry Harris, Jr., and John K. Ford, both of Los Angeles, of counsel), for appellant.

David L. Sefman and Jerome D. Rosenfield both of Los Angeles (David L. Sefman and Jerome D. Rosenfield, both of Los Angeles, of counsel), for respondent.

SHENK, Justice.

This is an appeal by the defendant from that portion of the judgment as modified which denied her separate maintenance and from the order of modification.

The plaintiff and the defendant were married in Troy, New York, on June 3, 1917. They separated about twenty years later. On July 12, 1937, the plaintiff husband commenced this action for a divorce on the ground of extreme cruelty. The defendant wife answered with a general denial and filed a cross-complaint for separate maintenance. The court found that she was entitled to a decree of separate maintenance, awarded to her most of the community property, including a retail infants' wear store, a going business, and found that the plaintiff was financially able and ordered him to pay the defendant $85 a month. On the plaintiff's motion for a new trial the court modified the judgment by striking therefrom the order for the payment of $85 a month.

The appeal is on the judgment roll alone. It is the defendant's contention that the modified judgment is not supported by the findings of fact and particularly paragraph VII, which states in substance that the plaintiff is financially able to pay support money and that the defendant has no income other than from the community prop-

erty; and also that the judgment is not supported by the conclusions of law where, in paragraphs II and IV, it is stated that the defendant is entitled to a decree of separate maintenance against the plaintiff and to the payment of $85 per month for that purpose.

In passing upon the motion for a new trial the court undoubtedly assumed to exercise the power granted by section 662 of the Code of Civil Procedure, enacted in 1929, which authorizes the court to modify the judgment on the motion for a new trial. The order of modification is referred to in the judgment roll opposite the paragraph which directed the plaintiff to pay $85 per month to the defendant for separate maintenance. The reference to the order is in the following language: "Modified by Order of Court filed 5/18/38—$85.00 mo. for support of Cross-complainant stricken from judgment." The findings of fact and conclusions of law above referred to do not appear to have been specifically modified, hence the basis for the contention of the defendant that the modified judgment is not supported.

Attached to the respondent's brief is a complete copy of the order of May 18, 1938, wherein the court stated that it appeared that the defendant "may properly maintain herself on the income from the community property allotted to her", and the modification, "pursuant to sec. 662 C. C. P.", was accordingly ordered.

There is also attached to respondent's brief the copy of a stipulation entered into during the trial, wherein it was agreed, among other things, that the operating profit of the infants' apparel store set aside to the defendant and being operated by her was $2,207 for the calendar year 1937, and that during the period of thirty weeks from July 7, 1937, to January 31, 1938, the defendant withdrew from the store accounts the sum of $2,125, which was about $300 per month.

[1-4] While not disputing the stipulation or the substance of the order of May 18, 1938, the defendant nevertheless contends that these documents may not be taken into consideration on an appeal on the judgment roll. In this the defendant's position is well taken, inasmuch as the court, on this kind of an appeal, is precluded from considering any matters of fact not a part of the judgment roll, and the documents referred to are not included. If the order of May 18th had been included, the finding of the court therein would demonstrate without more the ineffectiveness of the appeal. Since it is not and the appellant has elected to prosecute the appeal on the judgment roll alone, he necessarily excludes us from a consideration of anything except that which is included therein and requires the court to resort to the inferences and established rules applicable to appeals on the judgment roll, among which are that the findings are to be liberally construed and will be given a construction which will uphold, rather than defeat, the judgment; and that any ambiguities or inconsistencies in the record properly before the reviewing court will be resolved in favor of sustaining the judgment. Ochoa v. McCush, 213 Cal. 426, 2 P.2d 357; Menghetti v. Dillon, 10 Cal.2d 470, 75 P.2d 596, and cases there cited.

[5, 6] It affirmatively appears on the face of the judgment roll that the trial court by the order dated May 18, 1938, modified the judgment by striking out the provision for payment as separate maintenance. That order is not set forth in full in the judgment but is referred to in substance and effect. Applying the foregoing rule to that order, it is assumed that there were facts before the court when it was made which would support it and that it contained findings of fact and conclusions of law adequate to support it. The reference to it in the judgment is sufficient to justify the inference that every thing was done which would render it an effectual modification of the judgment and that the findings and conclusions elsewhere in the judgment roll and inconsistent therewith are not controlling. If the appellant desired that the rules be not thus applied to the record she presents, she should have enlightened the court with a record of contrary import, if such a record could have been produced. There is nothing in the judgment roll which would warrant a reversal of either the judgment or the order.

The judgment and order are therefore affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; GIBSON, J.; CARTER, J.; CURTIS, J.; HOUSER, J.

38 Cal.App.2d 167

## FARISH v. PACIFIC INDEMNITY CO. et al.

Civ. 11234.

District Court of Appeal, First District, Division 2, California.

March 26, 1940.

**1. Appeal and error ⇐761**

Headings in appellants' briefs should set forth points requiring reversal or modification of judgment if the points are well taken.

**2. Highways ⇐113(5)**

In subcontractor's action on statutory bond executed by contractor who had contract with highway district for construction of portion of tunnel, evidence sustained judgment for subcontractor for reasonable value of services rendered in excavating and grading, and piling and hauling dirt, less sums which had been paid to other subcontractors who did part of the work. Gen. Laws 1937, Act 6423.

---

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by R. A. Farish against the Pacific Indemnity Company and another on a bond. From an adverse judgment, the defendants appeal.

Affirmed.

Courtney L. Moore and Walter A. Dold, both of San Francisco, for appellants.

Ray E. Montrose, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff brought this action upon a bond executed by defendant DuPuy, as principal, and defendant Pacific Indemnity Company, as surety. The cause was tried by the court sitting without a jury and plaintiff recovered a judgment in the sum of $9,915.89. Defendants appeal from said judgment.

Defendant DuPuy had entered into a contract with the Joint Highway District No. 13 for the construction of a portion of the Broadway low level tunnel. The above-mentioned bond in the sum of $218,000 was executed pursuant to the requirements of the Public Works Act. Deering's Gen. Laws, Act 6423. DuPuy subcontracted the grading and paving portion of the work to P. L. Burr. Burr subcontracted certain grading work to plaintiff, R. A. Farish, who in turn subcontracted to Tieslau Brothers the work of removing the dirt from the tunnel after the grading and piling by plaintiff. Tieslau Brothers rented the equipment for the removal of said dirt from A. J. McCosker. The work covered by plaintiff's original contract was completed and certain additional work was done by plaintiff, including further grading and the furnishing of equipment and men to DuPuy and Burr. The work under plaintiff's original contract was done at an agreed total cost while the additional work was done upon an hourly basis. Plaintiff continued to perform the work and to furnish the equipment until October 15, 1937, when he was forced to quit because of his failure to receive the agreed payments.

Prior to the filing of this action upon the bond, plaintiff has received, either directly or indirectly through payments made to plaintiff's subcontractors and men, the following amounts: (1) $1,500 paid by Burr to plaintiff; (2) $2,000 paid by Burr to Tieslau Brothers, and (3) $6,140.31 paid by Burr to Farish's employees, making a total of $9,640.31. Separate actions were filed upon the bond by each of the following: Burr, Farish, Tieslau Brothers and McCosker. Tieslau Brothers included in their complaint the claim of McCosker. Farish included in his complaint the claim of Tieslau Brothers. Burr included in his complaint the claim of Farish. These actions were tried at the same time with the exception of the action brought by Burr, in which last-mentioned action a jury trial had been demanded. Separate findings and judgments were entered, the judgments in favor of Tieslau Brothers and McCosker aggregating the sum of $3,623.75. In this action the trial court found that the reasonable value of the materials and labor furnished by plaintiff and the renting and hiring of equipment by plaintiff for said work was the sum of $23,179.95, being the amount of $24,849.90 alleged in the complaint less certain items disallowed by the trial court. From the reasonable value so found, the trial court deducted the sum of $9,640.31, being the sum previously received by plaintiff, directly or indirectly as above set forth, and also the sum of $3,623.75, being the aggregate amount included in the judgments in favor of Tieslau Brothers and McCosker. This left a balance of $9,915.89, for which sum the judgment was entered in favor of plaintiff herein.

[1] A reading of the briefs discloses that defendants contend that the judgment should have been entered in the sum of $3,089.64 instead of the sum of $9,915.89. Defendants do not, however, set forth in the headings in their briefs any points which require a reversal or modification of the judgment. Richmond Terminal Corp. v. Parr Terminal Corp., 116 Cal.App. 368, 2 P.2d 579; Adams v. Standard Accident Ins. Co., 124 Cal.App. 393, 12 P.2d 464. It does not appear from said headings that any claim is made that the evidence was insufficient to support the findings of the trial court and there can be no doubt that said findings support the judgment entered. In the body of the briefs there appears to be some claim of insufficiency of the evidence to support the findings but defendants seek to clarify their position in the reply brief by the following statements: "So that there can be no misunderstanding, and the position of appellants may be readily and easily understood, appellants claim that Farish's efforts to charge the general contractor's bondsman with $660 for foreman's time and $5,866.25 for the removal of the dirt from the Broadway low level tunnel job, is erroneous because Farish did not pay the foreman the $660, and because the removal of the dirt was actually performed by Tieslau Bros. (who were subcontractors of Farish) and who have been paid for their work and labor by appellants. * * * The issues in the present case are, therefore, purely factual, namely, whether Farish paid for the foreman's charge, and whether he actually performed the hauling of the dirt out of the tunnel, for both of which items he is attempting to recover."

The factual issues last mentioned may be readily disposed of as both sides agree that Farish did not pay the foremen and that Farish did not perform the hauling of the dirt out of the tunnel. It is conceded by all that Burr paid the foremen and that Tieslau Brothers did the hauling. It does not appear, however, that the items for either foremen's pay or hauling were included in the judgment entered in favor of plaintiff.

[2] As we read the record, plaintiff sought to recover the reasonable value of all services performed by him and by his subcontractors, including the furnishing of labor and materials and the furnishing of equipment, less certain payments previously made as above set forth. There was ample evidence to show the reasonable value of all of these services. It appeared, however, that Burr, and not the plaintiff, had paid the foremen's wages and the trial court eliminated these items from the judgment in this action. It further appeared that while plaintiff had performed the excavating, grading, piling and hauling, either directly or through his subcontractors, the hauling had been done by Tieslau Brothers, who had used the equipment rented from McCosker. The trial court therefore eliminated from the judgment in this action the sums which Tieslau Brothers and McCosker had received by way of payments from Burr or had recovered in their actions upon the bond. In our opinion there was ample evidence to sustain the judgment entered in favor of plaintiff for the balance remaining after eliminating said items.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




38 Cal.App.2d 99

## In re HANSEN'S ESTATE.

Civ. 6202.

District Court of Appeal, Third District, California.

March 21, 1940.

Hearing Denied May 20, 1940.

1. Wills ⇐386

In will contest, jurors are sole judges of weight of evidence, and it is duty of appellate court to determine only whether there is adequate evidence to support findings of jury and judgment of trial court.

2. Wills ⇐55(1), 166(1)

In will contest, evidence was sufficient to support jury's findings that testator was of unsound mind and lacked testamentary capacity, and that will was procured by sole devisee's fraud and undue influence.

3. Wills ⇐21, 155(1)

Very little difference exists regarding law which applies to principles of unsound mind and undue influence affecting validity of will.

**4. Wills ⇐52(1)**

Testamentary capacity may be presumed when it appears that maker of will is capable of rationally considering and understanding nature and importance of act of making his will, the identity, location and character of his property to be affected thereby, and the persons related by ties of blood, affinity or friendship, who are normally entitled to his bounty, together with manner and portions of his property which he desires to bequeath or devise to each individual.

**5. Wills ⇐324(2)**

In will contest, whether testator was capable of rationally considering and understanding nature and importance of act of making will, identity, location and character of his property affected thereby, and persons related to him by ties of blood, affinity or friendship, who were normally entitled to his bounty, together with manner and portions of his property which he desired to bequeath or devise to each individual, were fact questions to be determined by jury from evidence adduced.

**6. Wills ⇐55(3)**

Proof of testator's hallucinations or delusions is insufficient to set aside will for testamentary incapacity, unless it further appears that they bore directly on testamentary act, but should be considered in connection with physician's testimony that testator at time of executing will was suffering from "senile dementia" which is a progressive incurable form of fixed insanity accompanied by delusions and hallucinations resulting in total collapse of mental faculties which robs the victim of his power to think, reason or act sanely.

See Words and Phrases, Permanent Edition, for all other definitions of "Senile Dementia".

**7. Wills ⇐384**

In support of verdict that testator was of unsound mind and lacked testamentary capacity at time of executing will, it may be assumed that jury believed that witnesses to will who testified that testator appeared to be of sound mind when executing will, did not have the opportunity of judgment of testator's mental capacity as accurately as a skilled physician, or intimate acquaintances.

**8. Wills ⇐55(1)**

In will contest, testimony of attorney who drew will and became witness thereto that testator appeared to be of sound mind and memory is entitled to serious consideration, but is not conclusive when other witnesses testify to contrary as such evidence creates only a conflict, and jury must finally determine weight and sufficiency of evidence.

**9. Appeal and error ⇐1001(1)**

A jury's finding, supported by substantial evidence, on any material issue, will be upheld on appeal.

**10. Evidence ⇐94**

The establishment of a presumption does not have the effect of shifting burden of proof from party upon whom affirmative of an issue rests.

**11. Wills ⇐166(2)**

In will contest, evidence of confidential relationship between testator and proponent, and activity on proponent's part, establishes prima facie case of undue influence, which invalidates will, in absence of contrary evidence.

**12. Trial ⇐296(7)**

In will contest, alleged error in instruction that presumption of undue influence or fraud controls and will is invalid, if beneficiary fails to show absence of such influence by preponderance of evidence, does not warrant reversal of judgment denying probate of will in accordance with jury's finding that will was procured by proponent's fraud and undue influence and void for testator's lack of testamentary capacity, in view of instruction that burden of proof on each of such grounds of contest rested on contestant.

---

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Proceeding in the matter of the estate of Peter Hansen, deceased, wherein Charles Hansen sought to probate the will of Peter Hansen, deceased, and the probate was contested by Carl Thomsen. From a judgment denying probate, the proponent appeals.

Affirmed.

Superseding opinion in 98 P.2d 797.

George R. Freeman and Elmer Laine, both of Willows, for appellant.

Ware & Ware, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

On rehearing we have modified certain statements of facts contained in our former

opinion. Otherwise we adopt that opinion as a correct determination of the issues presented, as follows:

Charles Hansen offered for probate the alleged last will of his brother Peter Hansen, deceased, dated November 26, 1936, by the terms of which the proponent was made sole devisee and executor of the estate. The will was contested by Carl Thomsen, an intimate friend and benefactor of the deceased, with whom he had lived for twenty years. Thomsen held a ten-year lease on the ranch which was the chief subject of controversy. He was also named as devisee of a portion of that ranch in a former will which was executed a few months prior to the making of the instrument which is involved in this suit. A jury found that the last will was procured by fraud and undue influence of Charles Hansen, and that it was void for lack of testamentary capacity of the maker thereof. A judgment refusing to admit the will to probate was accordingly rendered. From that judgment this appeal was perfected.

It is contended the special findings and judgment are not sustained by the evidence, and that the court erred in instructing the jury with respect to the presumption of fraud and undue influence which follows from proof of a confidential relationship between the maker of a will and a beneficiary who is active in its preparation.

In spite of a conflict of evidence upon the essential issues of this case, the following statement of facts satisfactorily appears from the record in support of the findings and judgment.

Peter Hansen was born in Denmark in 1866. He had five brothers, of whom Charles was his junior by six years. Peter moved to America and settled in Butte county, California, in 1888. For nearly ten years these two brothers were engaged as partners in farming and in the business of freighting over the mountains. Differences arose between them and their partnership was dissolved. Thereafter they rarely associated or even met each other. They lived on separate farms forty miles apart. Peter bought a small ranch in Butte county where he lived alone for several years. He was never married. Peter was always a frugal and industrious man. He lived modestly, paid his debts and saved some money. He was naturally active, intelligent, good humored and friendly. He was orderly, cleanly, and neat in his personal appearance and habits. He was a constant reader of newspapers and kept himself well informed on subjects of common interest. He gained a large circle of friends and acquaintances who held him in high esteem. He was honest, just and reliable.

After the dissolution of their partnership, Charles prospered for a time, accumulating a large amount of real and personal property. In 1919 he was estimated to be worth approximately $150,000. He drove a Cadillac automobile, and was fond of display. Peter had the impression that Charles had become arrogant and proud, and that he considered himself superior. Peter said they got along amicably while they were poor, but as soon as Charles became rich he began to "high-hat" him. They severed business relations twenty years before the execution of the will and rarely ever visited or associated with each other except as they casually met at Chico. Carl Thomsen, with whom Peter had resided for nearly that length of time, said that he had never seen Charles until seven years after he met Peter. Charles was married and lived near Red Bluff, while Peter resided at Vina Station in Tehama county. The other four brothers never left Denmark. No correspondence was carried on with any of them for several years.

In his prosperity during good times, Charles became extravagant and careless. During the depression which began with the crash in 1929, he lost his property. By 1932 he was impoverished and frequently borrowed small sums of money from Peter. Peter was disgusted with his brother and often criticised him, complaining that he was always trying to borrow money from him. Peter lost confidence in him and refused to engage in the sheep business with him. On the contrary, Peter was frugal, conservative and careful. He gradually accumulated property of considerable value in spite of the hard times and depression which ruined so many farmers.

Carl Thomsen was a countryman of the Hansens. He was twenty-five years younger than Peter. He moved from Denmark in 1910 and located in Butte county, working for several years as a farm hand. He was an industrious and capable farmer. He was honest and reliable. He soon married an attractive, worthy woman. Almost immediately after their marriage Peter met and acquired a great friendship for both Mr. and Mrs. Thomsen which lasted without impairment until a brief time be-

fore his death. Peter lived in their home for several years, contributing liberally to the cost of their maintenance.

Peter Hansen sold his farm in 1919 for $14,000 and bought a 210-acre fruit ranch at Vina Station in Tehama county for $30,-100. He paid $10,000 cash, and secured the balance of the purchase price with a trust deed. The southerly 68 acres of that farm was separated from the remaining portion by a double row of trees extending along either side of a roadway. The northern part of the place, above the lane, contained the most valuable, tillable soil. The improvements consisted of a dwelling house and other farm buildings. Upon acquiring this farm Peter immediately invited Mr. and Mrs. Thomsen to live with him and to help take care of the premises. It thereafter became and was their home until the time of Peter's death. They lived together happily. The Thomsens respected and looked after Peter's interests faithfully as long as he lived just as they would have treated their own father. Until the last few weeks of his life Peter appreciated their service and care for him and he was as fond of them as though they were his children. The Thomsens had two adopted children. Peter was attached to them as deeply as though they were his own grandchildren. He was furnished a comfortable room in the dwelling house and a place of honor at the table. For the first few years Carl was paid no regular wages, but Peter contributed liberally to their maintenance. The respective parties were contented and satisfied with the arrangements. Thomsen worked with Peter on the farm and helped him to construct several buildings. They lived as one family in perfect harmony.

As Peter Hansen grew older he sought to avoid the responsibility of operating his farm. In 1923, by mutual agreement, he leased the farm to Carl Thomsen for a term of ten years for a cash rental of $3,000 per year. Thomsen purchased and furnished the farm equipment, including a tractor and other machinery. He also owned an automobile. Peter continued to remain with the Thomsens as a member of their household exactly as he had previously lived, without being required to pay board or rent, although he made substantial contributions to their maintenance. It was agreed that Peter should pay the cost of irrigating the farm. Thomsen's farming enterprise prospered for several years and he paid his rent promptly. Peter reduced his mortgage of $20,000 to the sum of $6,200. Thomsen built a hog pen, fences and other improvements at his own expense in the sum of about $1,-500. The depression arrived. Farming became more difficult. Products were hard to market at a profit. Many farmers became bankrupt. Thomsen was industrious and frugal, but he was then unable to clear a profit sufficient to enable him to fully pay his stipulated rent. Peter never complained. He told Thomsen to "Go ahead and pay whatever you can". During the last years of his first lease Thomsen was in arrears in payment of his rent to the extent of several thousand dollars. During those latter years, by common consent, the taxes, interest on the mortgage, and operating expenses of the farm were first paid, and the balance of the net proceeds from the farm were divided equally between Thomsen and Peter. In 1935, Peter suggested that Thomsen should pay him in lieu of the agreed rent of $3,-000 per year, one-third of the gross receipts from the farm, which was done. The relationship between Peter and the Thomsen family continued to remain pleasant and agreeable. Peter never complained of Thomsen's treatment of him until a few weeks before the last will was executed.

Upon one corner of his ranch, Peter constructed a gas station, called the "Owl Service Station". For several years it was rented and operated by A. L. Wood, a friend of his. Later it was rented and operated by Mr. James D. Armstrong. Peter often visited and lounged about that station. He was well acquainted with both renters. When hard times came and the farming enterprise became discouraging, Peter often told Carl Thomsen that if he and his family would remain with him on the farm while he lived he would give him a portion of the ranch. Peter had become very dependent upon Thomsen and his wife. Although he often criticised his brother Charles, Peter always told Thomsen he intended to leave his brother the southerly 68 acres of the farm. He explained that he was going to do that "just because he is my brother". The relationship between Peter and the Thomsens was always so considerate that some of the neighbors got the impression Peter was the father of Mrs. Thomsen. Peter rode with them in their automobile. They usually took him with them on their pleasure excursions.

In the summer of 1936, Peter began to talk to Thomsen of renewing his ten-year lease of the farm. It expired that fall. Peter had then become quite deaf. He had acquired some ailments. He did not always feel

well. He was then 70 years of age. He anticipated that he might not live for many years more. Still he was clear-minded, comparatively alert, and continued to follow the same cleanly and orderly habits with which he was accustomed to live.

In July, 1936, Thomsen took Peter to Black Point in Marin county for the benefit of his health. After remaining there for a few days, and receiving no benefit, they returned July 28th, by way of Orland, where Peter consulted his physician, Doctor H. H. Beck, who told him he had high blood pressure and that he was in great danger of receiving a paralytic stroke. The doctor then advised him that if he had any unsettled business he had better attend to it.

Before going to Black Point Peter called at the office of the law firm of Ware & Ware in Chico. They had previously acted as his attorneys. He asked Mr. Phil Ware whether a ten-year lease of his farm would remain in force during the entire term, in case he renewed it, even though he should die in the meantime. He was told that it would remain valid during the entire term whether he lived or died. He told Mr. Ware that was exactly what he wanted to do. Mr. Ware then wrote on a slip of paper a memorandum explaining the effect of a renewal of the lease for a further term of ten years, which was found among the papers of Peter after his death. Peter left the attorney's office saying he would return later and have that renewal of the lease drawn.

The day after Peter's return from Black Point he told Thomsen he wanted to go to Chico and get the lease and a will drawn. He was anxious to renew the lease before he died. He was reminded that the doctor advised him he should not travel in his physical condition. He was then feeling badly. Peter instructed Thomsen to telephone to his attorneys and ask one of them to drive out to the farm and draw those instruments for him. Thomsen promptly called Mr. Allison Ware, who drove out to Vina Station that evening in response to the message and fully discussed the terms of the proposed renewal of the ten-year lease in the presence of both Carl Thomsen and Peter. Mr. Ware was well acquainted with Peter Hansen. He had known him for eighteen years and had occasionally represented him in a number of legal transactions. Peter said that the reason he wanted to make another ten-year lease to Thomsen was that he was perfectly satisfied with his fulfillment of the last one, and that, while he intended to leave his brother Charles the southerly 68 acres of the farm, he wanted to keep the entire ranch intact for that period of time, thinking that if his brother was hard up and needed money Mr. Thomsen might buy the 68-acre tract from Charles and pay cash for it. Peter took from his private box the original ten-year lease and exhibited it to Mr. Ware. He told the attorney he wanted to renew that lease. He also inquired from Mr. Ware, as he had previously asked his brother Phil, whether the proposed ten-year lease would be valid for the entire term in case he should die in the meantime. Mr. Allison Ware assured him that it would remain valid. He told the attorney he wanted to be sure of that fact. That was his purpose in renewing the lease before the term of the original lease expired. Mr. Ware inquired of Peter regarding the details of the proposed lease, and carefully made notes from which to draw the lease. Peter Hansen knew exactly how he wanted the lease drawn. He directed the attorney with respect to all of its essential terms. Peter then talked with Mr. Ware about preparing a will for him. He told the attorney the reason he wanted to give the northerly portion of his ranch to his friend Carl Thomsen, subject to his payment of the balance of the mortgage remaining against the property, which amounted to $6,200, was to reward him for his kindness and service. He also wanted Thomsen to have the remaining personal property, and to be appointed executor of the will. In accordance with his frequently-expressed desire, he wanted Mr. Ware to provide that his brother Charles should be given the southerly 68-acre tract, free from the mortgage, subject, however, to the proposed ten-year lease. During the time the terms of that will were being discussed, Mr. Thomsen was absent from the room. Having obtained the required information, the attorney returned to Chico and procured the typing of both the lease and the will on the following day. By agreement, he returned that evening with the two documents, accompanied by Colonel Thompson, who was requested to act as a witness to the will. The lease was carefully read and its terms were explained in the presence of both Peter and Mr. Thomsen. It was then formally executed by them. The lease was impartially drawn in substantially the same terms contained in the former ten-year lease, and in the exact manner directed by the lessor. It contained the usual formal covenants fully protecting the interests of Peter Hansen according to his instructions.

After the lease was executed, Mr. Thomsen left the room, and the will was read to Peter Hansen and carefully explained in every detail by Allison Ware. Colonel Thompson was then called into the room, and the terms of the will were again read and explained in his presence. Peter expressed his entire approval of the terms of the will, and formally executed it in the presence of those gentlemen, requesting them to sign it as witnesses, which they did in the manner required by law. A carbon copy of the essential portions of the will was left with Mr. Hansen by the attorney. The original will was handed to Mr. Ware with the request that he should keep it for the testator, which he did. It is an admitted fact that Peter Hansen was of sound mind when that will and lease were executed. The lease was subsequently acknowledged before Mr. H. M. Hersey, a notary public of Tehama county, and recorded by him at the request of Peter Hansen.

After July, 1936, Peter Hansen's physical and mental ailments developed very rapidly. His cleanly and orderly habits changed. He refused to bathe. He frequently soiled his clothing and the bed. He did not realize the disorderly condition in which he often appeared at the table and in the presence of other persons. He made no attempt to avail himself of the facilities to relieve the demands of nature. He lost his sense of propriety and abandoned the customary rules of behavior in his association with other individuals. He went about the house and on the public streets with his clothes unbuttoned and his shoes unlaced. He ceased to read or talk to his friends. His mind wandered. He wept. Without reasonable cause, he lost his love and attachment for Mr. and Mrs. Thomsen and their children, of whom he had previously been very fond. He became suspicious and extremely critical of them. He frequently visited the Owl Service Station and talked with Mr. Armstrong about them. Armstrong was unfriendly with Mr. Thomsen and appears to have prejudiced Peter against him. Without just cause, Peter acquired the fixed delusion that Thomsen was taking advantage of him, and that he had in some way procured the execution of the first will in his own favor. He asked him how his name came to be placed in the will. He charged Thomsen with obtaining unjust and detrimental terms to be included in the ten-year lease. Substantial evidence refutes the truth of those accusations. The record satisfactorily shows that both instruments were not only fair and reasonable in their terms, but that they were prepared in the exact manner and form directed by Peter Hansen. He was confused and irrational regarding the specific terms of the instruments of which he complained, except that he seemed to be impressed with the conviction that the ten-year term of the lease was too long a period of time and that it was so drawn contrary to his wishes. That was evidently not true. Regarding that feature of the lease, there appears to be no doubt the long term of ten years was precisely what he requested and wanted to provide for.

Immediately before the last will was executed it appears that Charles Hansen arranged for and secretly met his brother Peter and Armstrong at the Owl Service Station, which gave them the opportunity to exercise undue influence upon Peter. It seems probable, as the jury found, that they did prejudice and control the mind of Peter so as to persuade him to execute that last will in the interest of Charles. The evidence satisfactorily shows that until a few days before that will was executed there had been only casual association between the brothers for several years. Armstrong was the man who arranged for the secret meeting. Peter charged Thomsen with recording the lease without his consent. The evidence shows that it was acknowledged and recorded by H. M. Hersey, the notary public, at the request of Peter Hansen.

On Sunday evening preceding Thanksgiving Day in 1936, Charles Hansen took a copy of the last lease to his attorney at Willows and consulted him about the prospect of breaking that instrument. That lawyer had been Charles' regular attorney for many years, although he had never met his brother Peter. By previous arrangement, without notice to the Thomsens, Charles called at the gas station early on Thanksgiving morning, and took Peter in his automobile to Willows to interview his attorney. Peter then had in his pocket copies of the lease and of his first will. Upon inquiry, Peter told the lawyer regarding the lease that "He didn't know what he was signing when he made it, that under it he didn't have any rights at all". The attorney examined the lease and told Peter he had "a tough job ahead of him to break that lease". In fact, the lease seems

to be fair and impartial. It appears to adequately protect the rights of the lessor. It is couched in the usual terms, and contains the customary covenants of a carefully prepared lease of that nature. It was fairly drawn in every respect in the exact manner and terms directed by Peter. Finally Peter drew from his pocket the carbon copy of his first will and handed it to the attorney, who said, "Well, apparently you have made a will?" To this inquiry Peter replied, "No, he didn't make a will". In spite of the fact that he brought with him the carbon copy of the will, he had no recollection of having made that instrument. The attorney then testified that when he told Peter Hansen there was no reasonable chance of breaking the lease, Peter said, "If I can't do anything with that, if you say I made a will, I can fix that. I will make another will". The last will, which is involved in this suit, was then drawn. By its terms Charles Hansen was given the entire estate, including both real and personal property. His other living brothers are not mentioned in the will. Charles was named as executor without bonds. The will was witnessed by the attorney and a friend by the name of Speier, who was called in for that purpose. The will was left in the custody of the attorney, who instructed Peter to obtain his first will from Mr. Ware and destroy it. The first will was delivered to Peter, but he did not destroy it. After the execution of the second will, Charles took his brother back to Vina Station, arriving just in time for him to keep a previous engagement and go with Mr. and Mrs. Thomsen to attend a Thanksgiving dinner at the home of a friend. Peter started to appear at the dinner in a dirty and disorderly condition with his old clothes on. He was persuaded by his brother to change his clothes, but he went to the table with his clothes unbuttoned, his shoes unlaced and without a necktie. He was morose, silent and refused to eat. He wept and wanted to be taken home. He seemed dazed and irrational. When the Thomsens inquired where Peter had been, Charles said they had gone to Willows to see a real estate man. That was not true. The last will was procured by the influence and activity of Charles. The transaction was conducted in secret.

About the time of the execution of the last will, Peter's physical and mental condition rapidly grew worse. He was nervous and despondent. He wandered about aimlessly. He carelessly walked along the highway and the railroad track without regard to traffic or trains, apparently failing to realize his great danger. He avoided association with former friends. He refused to speak to them. He sat in his own room for hours just gazing about. He frequently wept for no apparent cause. He talked disconnectedly and illogically. He related hallucinations which he had that strange men crept into his bed at night and sapped his strength and manhood. He related that story to his physician. He bought a revolver at Red Bluff for no explained reason. When he was asked by Mr. Hersey what he wanted a pistol for, he said, "Things were bothering him. He had to tend to something." He had never before owned or used a revolver. He offered no rational explanation for purchasing the revolver. When the package containing the weapon reached their home, Thomsen saw it and asked Peter what he was going to do with a gun. Peter cried and said that he didn't know what he wanted it for. Thomsen, as a precautionary measure, said, "I think, Peter, you better let me do the shooting around here". Peter promptly handed him the revolver and said, "I think you better, Charley."

The record is replete with incidents indicating that when the last will was executed, Peter Hansen was afflicted with senile dementia which was developing rapidly. His conduct, conversation and appearance convinced two physicians and many intimate friends and neighbors that he was irrational and incompetent. Doctor Faulkner, whom Peter visited and consulted professionally several times at Red Bluff in the month of October, 1936, testified to the insane delusion related by Peter regarding the strange men who slept in his bed and sapped his strength and vitality. The doctor said Peter really believed it. The doctor was so impressed with the existence of that fixed delusion that he asked Mrs. Thomsen if Peter did not act abnormally about the home. Doctor Beck, who attended Mr. Petersen, the father of Mrs. Thomsen, frequently in November, 1936, during his last illness, observed Peter about the house during that period of time. He had known Peter for several years. He said that Peter had changed mentally very rapidly; that he no longer knew what was going on about him; that he sat and wept for no apparent cause, and stared at the wall; that he was unclean, exhibited no mentality; that he was of "unsound mind" and that he was afflicted

with senile dementia. Certainly he had the symptoms of that incurable malady.

Nearly a dozen intimate friends and neighbors testified to acts, conduct and conversations on the part of the testator about the time the will was drawn from which they concluded that he was "mentally deranged", "irrational" or of "unsound mind". The testimony of Mr. Allison Ware, regarding his attempt to converse with Peter when he called to inquire about the lease a few days before he executed the second will at Willows, leaves very little doubt that his mental faculties were sadly impaired, and that he did not comprehend or understand the transaction he was engaged in. Senile dementia is a progressive, incurable form of insanity. The delusions and hallucinations which he possessed are common symptoms of that disease. The evidence is very convincing that he had reached a state of mind by Thanksgiving Day, when he executed the second will, that warranted the jury in finding he was then of unsound mind to the extent that he lacked testamentary capacity.

[1] We have not attempted to analyze the evidence of witnesses who testified in behalf of the proponent. It was the province of the jury to weigh and consider that evidence. It is our duty to determine only whether there is adequate evidence to support the findings of the jury and the judgment of the trial court. We have concluded there is sufficient evidence to serve that purpose. It would therefore be an idle task to attempt to review that conflicting testimony.

The record of the testator's banking transactions about the time of the execution of the will furnishes only a conflict of evidence regarding his mental capacity which we assume the jury fully and fairly considered. The jurors were the sole judges of the weight of that evidence. Among a few simple banking transactions two irregular ones may be deemed to indicate a lack of ability to understand the nature of the business affairs. On January 15, 1937, he presented and cashed what is termed a "postdated" or a "flyer check" under date of February 7th for the sum of $10. April 20, 1936, he drew his check for $163.44 in payment of taxes which were not due until November of that year, and that check was not presented or paid until November 27, 1936. The banking transactions are not conclusive evidence of his testamentary capacity.

The last tragic act of the testator's life indicates mental incapacity and a lack of understanding. He did not even exercise ordinary precaution for his own safety. He was extremely deaf, yet he carelessly walked along the railroad track heedless of his danger. A freight train overtook and killed him. The engineer saw him walking along the track but assumed that he would step from the track when the train approached. He said that Peter seemed to be absolutely unconcerned until it was too late for him to stop the train.

[2] The record contains an abundance of evidence, in spite of adverse testimony on behalf of the proponent, to support the findings of the jury to the effect that the testator was of unsound mind, that he lacked testamentary capacity, and that the will was procured by the fraud and undue influence of Charles Hansen.

[3-5] It would be a useless task to attempt to analyze the numerous authorities cited by respective counsel on various phases of this case. Very little difference exists regarding the law which applies to the principles of unsound mind and undue influence affecting the validity of a will. Apparently the chief controversy involves only a correct application of those well-established rules to the particular facts of this case. It is conceded testamentary capacity may be presumed when it appears that the maker of a will is capable of rationally considering and understanding the nature and importance of the act of making his will, the identity, location and character of his property to be affected thereby, and the persons related by ties of blood, affinity or friendship who are normally entitled to his bounty, together with the manner and portions of his property which he desires to bequeath or devise to each individual. Estate of Russell, 189 Cal. 759, 770, 210 P. 249; Estate of Ehle, 115 Cal.App. 656, 660, 2 P.2d 398; 26 Cal.Jur. 638, sec. 12. These are facts to be determined by the jury from the evidence adduced.

In his contention that the findings of the jury are not sustained by the evidence in this case, the appellant relies chiefly on the Estate of McDonough, 200 Cal. 57, 251 P. 916, and Estate of McGuirk, 50 Cal.App. 352, 195 P. 279. These cases are readily distinguishable on the facts from the present proceeding. In the McDonough case, a judgment based on a finding of a jury that the testator was of unsound mind was reversed for lack of evidence to support it.

The Supreme Court said that the acts relied on to show unsound mind were all reasonably attributable to mere infirmities of old age, caprices and idiosyncrasies, and that no witness was willing to testify that he was afflicted with settled insanity. The court said in that regard [200 Cal. 57, 251 P. 918]: "No substantial evidence, however, tending to establish settled insanity or dementia or insane delusions or hallucinations on the part of the testator, was adduced."

In the present case there is definite evidence of hallucinations, delusions and settled insanity, in addition to many circumstances occurring about the time of the execution of the will in question, affecting a radical change in the personal appearance, conduct, conversation and attitude of the testator toward old friends and benefactors, which may be accounted for only by the existence of an unsound mind. His hallucination regarding the unknown men who slept with him and sapped his vitality and manhood; his unwarranted animosity toward his best friend and his fixed delusion that Thomsen had wrongfully procured the lease and will to be drawn in his own interest; the purchase of a revolver for some unexplained purpose and his total ignorance of having previously made a will, strongly tend to show a deteriorated mind in conflict with the existence of testamentary capacity. Doctor H. H. Beck, who had repeatedly attended him professionally, and who had seen him frequently about the time of the execution of the last will, after detailing his reasons for so concluding, testified that "I would say that he was mentally unsound, * * * an indication of senile dementia in a man that age."

The facts of the McGuirk case may likewise be distinguished from those of the present proceeding. In that case a motion for nonsuit was affirmed. The testator was sixty-two years old. He had suffered a stroke of paralysis. No witness testified that he was afflicted with settled insanity. No physician testified to his mental condition. Those witnesses who said that he was of "unsound mind" based their conclusions on general statements covering a period of twenty years, such as the assertions that he had said "his neighbors were trying to rob him"; the alleged error in judgment regarding a real estate transaction and other similar incidents reasonably attributable to an irascible old man. These incidents did not occur near the time of the making of the will. The court says that "No attempt was apparently made to show the time to which in their testimony the witnesses referred with relation to the time of making the will." The testator drew the will in his own handwriting from a copy furnished to him by an attorney. In that case the court was certainly warranted in affirming the order of the trial court. The facts of this case are much stronger than those of the McGuirk case in support of the finding of testamentary incapacity on the part of the testator. They are certainly sufficient to support the findings of the jury and the judgment of the trial court.

[6] It is true that proof of hallucinations or delusions is not sufficient in itself to set aside a will unless it further appears that they bear directly on the testamentary act. Estate of McDonough, supra. One may possess fixed delusions regarding certain things which have no relation to the faculties necessary to be exercised in the drawing of a will. A paranoiac, for instance, may possess insane delusions regarding a particular subject, and yet he may be perfectly sound and sensible on other matters and mentally capable of transacting business which does not involve that defect of mind. Paranoia, in its earlier stages, does not constitute total insanity and therefore may not deprive one of testamentary capacity. The presence of hallucinations or delusions, however, are ordinarily symptoms of insanity. They exist in unsound minds of various types.

In the present case we should consider the evidence of fixed hallucinations and delusions in connection with the doctor's testimony that the testator, about the time of the execution of the will in question, was suffering from senile dementia which is a progressive, incurable form of fixed insanity resulting in a total collapse of the mental faculties and, in its final state, necessarily deprives one of testamentary capacity. With that particular malady the victim is robbed of his power to think, reason or act sanely.

In the Estate of Hartley, 137 Cal.App. 630, 31 P.2d 240, it is said that radical changes in a man's habits of thought, conversation, conduct and appearance which affect his ability to understand and appreciate the nature and identity of his property and the individuals who would ordinarily be entitled to his bounty, particularly when he is afflicted with senile dementia, are

competent and persuasive evidence of a lack of testamentary capacity.

[7] It is true that both witnesses to the will testified that Peter Hansen appeared to be of sound mind when he executed the will. Both, very reputable men, said that he appeared to be neatly dressed and that he answered questions intelligently. One of these witnesses was the attorney who drew the will, and the other was a business man who was called in for that purpose. Neither of them had ever before seen the testator. They said that he was very deaf and that they were compelled to communicate with him by "hollering at him right to his ear". He merely answered a few simple categorical questions. We do not doubt the good faith of these gentlemen in believing that the testator was mentally competent to execute his will. Their evidence, however, merely raises a conflict. Neither of them had ever before seen the testator. In support of the verdict it may be assumed the jury believed they did not have the opportunity of judging of his mental capacity as accurately as a skilled physician or intimate acquaintances.

[8, 9] The testimony of an attorney who draws a will, and who also becomes a witness to the instrument, to the effect that the testator appeared to be of sound mind and memory, is entitled to serious consideration. It has been said his evidence may be entitled to more consideration than that of a mere relative, friend or acquaintance. But it is not conclusive when other witnesses have testified to the contrary. Such evidence creates only a conflict. The jury must finally determine the weight and sufficiency of the evidence. Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871; Estate of McDonald, 191 Cal. 161, 215 P. 545. Where there is substantial evidence to support the finding of a jury on any material issue, its determination of that issue will be upheld.

The appellant insists that the court erred in giving to the jury instruction number 35 to the effect that when a confidential relationship is shown to exist, coupled with activity on the part of a beneficiary in procuring the execution of a will, a presumption of undue influence is thereby raised, and the burden is then cast upon the proponent to show that the will was not procured by undue influence or fraud. That instruction contains the following statement: "If that burden has not been met, that is, if such person has failed to show by a preponderance of the evidence, an absence of undue influence, then the presumption of undue influence or fraud controls and such will will be invalidated."

[10, 11] It is true the authorities hold that the establishment of a presumption does not have the effect of shifting the burden of proof from the party upon whom the affirmative of an issue rests. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Valente v. Sierra Railway Co., 151 Cal. 534, 91 P. 481; Estate of Eakle, 33 Cal. App.2d 379, 91 P.2d 954; 10 Cal.Jur. 783, sec. 88; 68 C.J. 755, sec. 449. But when a presumption of undue influence is raised by showing the existence of a confidential relationship, coupled with activity on the part of the proponent of a will, a prima facie showing of undue influence is thereby established which, in the absence of evidence to the contrary, necessarily has the effect of invalidating the will because it is then not the result of the free will or volition of the testator. It logically follows that the presumption necessarily results in invalidating the will on that account. Under such circumstances the presumption becomes controlling. To overcome that prima facie showing it becomes necessary for the proponent to rebut the presumption by evidence which, at least, will have the effect of balancing the prima facie showing, or the will must be denied probate. Technically speaking, it may be true that the language of the challenged instruction goes too far in saying that the proponent must "show by a preponderance of the evidence an absence of undue influence". However, it is not necessary for us to determine that question, for undue influence is not the only issue upon which the judgment is predicated. The jury separately found that the will is void because the testator was of unsound mind at the time it was executed. In instruction number 20 the jury was clearly and correctly charged that upon each ground of contest the burden of proof rested upon the contestant. The challenged instruction had no bearing on the issue of unsound mind. Instruction number 20 reads:

"The burden of proof in this case is on the contestant, Carl Thomsen, to prove that the instrument offered here for probate by the proponent, Charles Hansen, was executed by Peter Hansen, deceased, while he was of unsound mind or that it was procured to be made by Charles Hansen by the use of undue influence or fraud and he

must prove one of such grounds by a preponderance of the evidence. There is no burden on the proponent to disprove any of the allegations of contestant's opposition to the probate of the will involved, and in this case if you find that the weight of the evidence bearing upon the whole case is in favor of the proponent, or that it is evenly balanced, then your verdict must be for the proponent."

[12] In view of the preceding correct statement of the law with respect to the burden of proof, which is specifically made applicable to the issue of unsound mind, the jury could not have been misled regarding that issue. Even though we may believe that the finding of undue influence is ineffectual and void, and that it would require a reversal of the case if that were the only ground upon which the will was found to be invalid, still the separate finding that the testator was of unsound mind and that he lacked testamentary capacity on that account is sufficient ground upon which to support the judgment in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




38 Cal.App.2d 174

**BULEY v. MURDOFF et ux.**

**Civ. 6327.**

District Court of Appeal, Third District, California.

March 26, 1940.

**1. Corporations ⇐123(10, 14)**

Where stock was delivered to vendor as further security for payment of purchase money indebtedness and purchaser failed to carry out agreement under which delivery was made, vendor was entitled to retain possession of the stock, to sell it according to the law pertaining to pledges and to apply balance upon indebtedness owing to him by purchaser. Civ.Code, §§ 2986, 3005.

**2. Corporations ⇐123(16)**

In action to rescind contract for sale of real property and to recover possession of notes and stock assigned by purchaser to vendor, where it was alleged in the complaint and denied in the answer that purchaser was entitled to possession of the stock, vendor was entitled to prove any facts which would give him legal possession, including fact that transactions involving the stock were intended as pledges.

**3. Damages ⇐85**

Where stock was delivered by purchaser to vendor as further security for payment of purchase money indebtedness, provision in agreement that stock should be retained as liquidated damages in event of default and not as a forfeiture for breach, if void because of provision for liquidated damages, was only void as to such liquidation clause. Civ.Code, § 1670.

**4. Corporations ⇐123(1)**

Where stock was delivered by purchaser to vendor, under agreements, as additional security for payment of purchase money note secured by trust deed, the fact that trust deed obligated purchaser to pay the amounts which were also mentioned in the agreements, whether principal or interest, would not render the agreements unenforceable for want of consideration, since extinction of the additional security would be a detriment to vendor.

**5. Corporations ⇐123(16)**

As respects action to recover stock pledged, where note was given and stock assigned to vendor to secure payment of amount in default on purchase money note secured by deed of trust, presumption that note for which stock was delivered as collateral was given for a sufficient consideration would prevail in absence of evidence from which it could be inferred that there was no consideration, particularly in view of consideration consisting of forbearance to sue on original purchase money note. Code Civ.Proc. § 1963, subd. 21.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. M. Buley against Frank L. Murdoff and wife to rescind a contract for the sale of real property and to recover possession of certain notes and stock assigned by plaintiff to defendant. From judgment denying rescission but ordering return of the notes and stock to plaintiff, the defendants appeal.

Reversed with directions.

Holbrook, Taylor, Tarr & Reed and Leslie R. Tarr, all of Los Angeles, for appellants.

Robert F. Shippee, of Los Angeles, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to rescind a contract for the sale of real property, and to recover possession of certain notes and stock assigned by respondent to appellant. Rescission was denied by the trial court, but judgment was entered ordering the return of said notes and stock to plaintiff. Defendant appeals from the judgment.

Throughout this opinion we have designated but one appellant, Frank L. Murdoff. The other appellant is his wife, but her name appears as a mere formality.

In the month of May, 1929, defendant sold plaintiff a tract of land in Los Angeles county. The purchase price was $52,699, and title was taken subject to a mortgage for $7,500 in favor of one Barnard. As part of the purchase price plaintiff executed a note and deed of trust in favor of defendant, in the sum of $45,199.

The complaint states an action for rescission, based upon alleged fraudulent representations made by defendant. It also alleges that, subsequent to said purchase, plaintiff was induced to deliver to defendant 125,000 shares of stock in Western Borax Company, Ltd., "by reason of the false and fraudulent statements and representations made by defendant Murdoff, as hereinbefore alleged". The allegations of fraud referred to are matters which took place prior to the sale, and not to any statements and representations made subsequent thereto in relation to the stock transaction. The trial court found that there was no fraud whatever in connection with the sale, and denied a rescission. Judgment, however, was rendered that the said shares of stock be redelivered by defendant to plaintiff, and the appeal is taken therefrom by defendant.

Within a short time after the sale, plaintiff became delinquent in his monthly payment of $1,000 upon the note mentioned. Finally, on July 28, 1931, the parties entered into an agreement, the purpose of which was to extend the time when defendant could sell the property under his deed of trust. Under its terms, 90,000 shares of the Borax Company were assigned and delivered to defendant, Frank L. Murdoff, who was the party of the first part. It provided that: "All moneys received by first party from the sale or disposal of said stock or from second party, shall be applied to the payment of the balance due of the principal and interest on a note in the sum of $45,199.00 made out in favor of Frank L. Murdoff and his wife, secured by a deed of trust, and the further sum of the principal and interest due on a note secured by a first mortgage, both encumbrances being imposed upon the property hereinabove described, and the further sum of $200.00 for past expenses in connection with this transaction."

It was also provided that: "In the event there is a default or breach of any provision of this agreement, 90,000 shares of the Western Borax Co., Ltd., stock hereby assigned, shall be retained by first party as liquidated damages and not as a forfeiture for the breach hereof, and this agreement shall terminate."

Nothing further was done with the stock, and it was in the possession of Murdoff at the time of the trial. It is quite evident that the stock was so delivered as further security for the payment of the indebtedness upon the property. Such indebtedness was never paid.

On July 31, 1931, the parties executed a second agreement. It recited that a promissory note for $1,633.10, signed by plaintiff with Murdoff as payee, was due, and that plaintiff desired to have the time of payment extended for thirty days. It provided that 7,000 shares of stock in the Borax Company should be assigned and delivered to Murdoff, "to be reassigned upon his compliance with the terms of this agreement". It also contained the same "liquidation clause" as appears in the first agreement. The note was never paid, and the stock was in the possession of Murdoff at the time of trial.

Early in July, 1931, plaintiff executed and delivered to Murdoff his promissory note in the sum of $5,500 to cover arrears in payments due under the deed of trust mentioned. At the same time plaintiff placed in escrow, as security for the payment of said note, 30,000 shares of the Borax Company. This note was never paid, and, together with the stock, is now in the possession of Murdoff.

Prior to the commencement of the action, the holder of the first lien upon the property (one Barnard) brought an action in foreclosure and acquired the title.

After finding there was no fraud whatever upon the part of defendant, and denying the right of plaintiff to rescind, the court concludes as law, that as to the 90,000 shares of stock, the provisions for a retention thereof by defendant was "in the nature of a penalty of forfeiture", and defendant is not entitled to retain possession thereof. The same conclusion is reached as to the 7,000 shares. As to the 30,000 shares, the court concludes that there was no consideration for the note for which said stock was delivered as security.

[1] It must be conceded that the first two blocks of stock mentioned in the above paragraph were delivered to defendant under agreements to pledge the same as security for the performance thereof. "Pledge is a deposit of personal property by way of security for the performance of another act." Civ.Code, § 2986. It is admitted that plaintiff failed to perform or carry out said agreements. Defendant is entitled to retain possession of said stock and to sell the same according to the law pertaining to pledges (Civ.Code, § 3005), and apply the balance upon the indebtedness owing to him from plaintiff.

[2] It is contended by respondent that appellant cannot justify his retention of possession of the stock upon the ground of a pledge because no such issue was presented by the pleadings. It was alleged in the complaint that plaintiff was entitled to possession, and this was denied in the answer. Under such pleadings, defendant was entitled to prove any facts which would give him legal possession. The fact that the transactions were intended as pledges is a defense which was available to defendant.

[3] Respondent appears to concede, as he must, that the provision for liquidated damages, if it be void, is only void in respect to such liquidation clause. Section 1670 of the Civil Code is express upon that point: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." As no attempt is here made by appellant to bring about a forfeiture in respect to the stock, we cannot see how the code section mentioned has anything to do with the case. The contract in all other respects remains in full force and effect.

[4] The court found that: "Defendants suffered no damage or detriment as the result of said defaults or breaches of said agreements, or by reason of plaintiff's failure to pay the promissory note for Fifty-five Hundred ($5500.00) Dollars, which were not adequately provided for in the terms of said deed of trust note."

The foregoing finding does not have any substantial support in the evidence. All the transactions referred to in such finding involve the giving of additional security for the payment of the note secured by the trust deed. The fact that the trust deed obligated respondent to pay the amounts which were also mentioned in the agreements, whether principal or interest, does not render such agreements unenforcible for want of consideration. The extinction or loss of the additional security would be, under the evidence, a detriment and damage to appellant.

[5] As to the remaining block of stock, the 30,000 shares, the court found that the note for which this stock was delivered as collateral was without consideration. The record shows that when the note was executed plaintiff was in arrears in his payments on the trust deed. The note was given, and the stock assigned to defendant to secure payment of the amount in default. Section 1963, subdivision 21 of the Code of Civil Procedure provides that it is presumed "that a promissory note or bill of exchange was given or indorsed for a sufficient consideration". We find no substantial evidence to rebut this presumption. There is the further consideration appearing which consists of the forbearance to sue on the original obligation upon the part of defendant. We might add that the testimony relating to all of these transactions is vague and indefinite, and in a very unsatisfactory state. Appellant has failed to point out any evidence from which it can be inferred that there was no consideration for the note. The finding should be eliminated.

In conclusion, it appears that plaintiff was greatly indebted to defendant at all times, and that the only security the latter had for the original obligation was a deed of trust, which was subject to a prior mortgage to a third party. This condition was detrimental to the security of the trust deed. All of the transactions, including the execution of the note and the subsequent contracts and assignments of stock, were for the express purpose of further securing defendant, as the trust deed became more

and more imperiled by plaintiff's failure to take care of the prior mortgage. Forbearance on the part of defendant to exercise his right of foreclosure under the trust deed constituted the underlying consideration for the transactions discussed. Defendant is entitled to the possession of the shares of stock mentioned in the judgment—125,000—but the court should order such stock sold in the manner provided for the sale of pledged property in the Civil Code (sec. 3005). Each of the three transactions should be treated separately. Where they provide for a method of dividing the proceeds from the sale, such directions should be followed. In the absence of directions, the proceeds should be applied to the particular indebtedness involved, and the surplus, if any, should be paid to plaintiff. In the case of the 90,000 shares, the proceeds should be applied to the entire balance due on the original note secured by the trust deed. The proceeds from the sale of the 30,000 shares should be applied to the note of $5,500. In the case of the 7,000 shares (actually reduced in number to 5000 by a sale of 2000), the proceeds should be devoted to payment of the note for $1,633.10.

The judgment is reversed, with directions to the trial court to enter findings and judgment in accordance with this opinion.

We concur: PULLEN, P. J.; THOMPSON, J.




38 Cal.App.2d 163

## WHITE v. WHITE.

Civ. 12269.

District Court of Appeal, Second District, Division 2, California.

March 25, 1940.

**1. Appeal and error ⇐655(2)**

Engrossed bill of exceptions which was presented to trial judge within 10 days after it had been settled was not required to be stricken because it was not signed and filed within 10 days after it had been settled. Code Civ.Proc. § 650.

**2. Appeal and error ⇐659(3)**

Where it was made to appear to District Court of Appeal by affidavit of trial judge that bill of exceptions omitted testimony which trial judge at time of settlement of bill of exceptions ordered included in the engrossed bill, the District Court of Appeal ordered such testimony to be included in engrossed bill at specified places.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mark B. White against Orrin A. White on a note. From an adverse judgment, defendant appeals. On motion to strike from clerk's transcript on appeal, the engrossed bill of exceptions and for such other and further relief as might seem just and equitable.

Order in accordance with opinion.

See, also, 100 P.2d 791.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for appellant.

T. W. Ward, of Pasadena, for respondent.

McCOMB, Justice.

This is a motion by respondent to strike from the clerk's transcript on appeal the engrossed bill of exceptions and for such other and further relief as to this court may seem just and equitable, on the grounds (1) that the transcript was not certified by the trial judge within ten days after the bill of exceptions had been settled, and (2) that the engrossed transcript omits testimony which the trial judge at the time of the settlement of the bill of exceptions ordered included in the engrossed bill of exceptions.

The essential facts are:

March 4, 1939, appellant filed a notice of appeal from a judgment theretofore entered in favor of respondent. Thereafter appellant obtained an extension of time for the filing of a proposed bill of exceptions, which was filed within the time as extended. The trial court set March 29, 1939, as the date for settling the objections to the proposed bill of exceptions and settling the same. At the appointed time the trial judge settled the proposed bill of exceptions. April 6, 1939, there was delivered to the trial judge the engrossed bill of exceptions. This the

trial judge did not check himself but left to his clerk for checking, who in doing so failed to notice that the following testimony which the trial judge had ordered included in the engrossed bill of exceptions had been omitted:

(1) Line 23, page two, engrossed bill of exceptions:

"1. Additional testimony of Orrin A. White:

" 'That the said Orrin A. White further testified that the said note had never been paid and/or that the sum of $2,000.00 had never been repaid to the plaintiff. That the sum of $2,000.00 as evidenced by said note was received by him and used in the construction of the dwelling house now owned and occupied by him. That immediately upon the receipt of the sum of $2,000.00 from Mark B. White, he sent the note referred to in the pleadings to the said Orrin A. White.' "

(2) Line 14, page three, engrossed bill of exceptions:

"2. Additional testimony of Mark B. White:

" 'That said witness further testified defendant requested in writing, a loan of $2,000.00 and that he replied to defendant agreeing to loan him the said sum of $2,000.00 and stated to him in a letter that he had some 15 year Gold Bonds with ten years left to run and that in order to make the loan he would have to cash those Gold Bonds and that he would use the proceeds thereof to loan the $2,000.00 to the defendant but that he would require a note from the defendant on the same terms and for the same length of time as existed in relation to the Gold Bonds referred to, which said Gold Bonds the note of defendant would have to replace. That pursuant to this letter the sum of $2,000.00 was sent by plaintiff to defendant, which said sum was obtained from the sale of the Gold Bonds and the defendant, in return, sent to plaintiff a note with the due date left blank and stated in an accompanying letter that said note would have to run for a long time as suggested by plaintiff and that he, defendant, would not be able to pay for at least ten years. That he, plaintiff, paid the said sum of $2,000.00 to defendant as consideration for said note.

" 'That plaintiff found it necessary to institute suit to enforce the payment of the note and retained T. W. Ward, as his attorney, for that purpose. That suit was instituted and that he incurred attorney's fees for the institution and prosecution of said suit and that under the terms of the note defendant promised to pay ten per cent of the amount due at the time suit was instituted as and for attorney's fees.' "

(3) Line 9, page nine, engrossed bill of exceptions:

"3. Portion of Deposition of Mark B. White:

" 'Q. Do you know when the two words here "10 years" were written on this note? A. Yes; certainly.

" 'Q. Well, when were those words written on this note? A. I believe it was last March. I am not sure, but approximately last March.

" 'Q. You mean by last March, March of 1938? A. March of 1938.

" 'Q. And do you know who wrote those words "10 years" on that note last March? A. Yes, I do.

" 'Q. Who did, Mr. White? A. I did.

" 'Q. I see. Did you have any instruction from your brother, Mr. Orrin A. White, to write those words "10 years" in on that note at that time? A. No, sir.' "

April 12, 1939, without checking the proposed bill of exceptions himself the trial judge certified the same to be correct and ordered the document to be filed.

[1] (1) There is no merit in respondent's contention that the proposed bill of exceptions should be stricken, for the reason that it was not signed and filed within ten days after the same had been settled. Section 650 of the Code of Civil Procedure provides that the proposed bill of exceptions must be engrossed and *presented* to the trial judge within ten days after the same has been settled. There is no provision that an engrossed bill of exceptions shall be signed within ten days after the same has been settled. In the instant case the proposed bill of exceptions was presented to the trial judge within 10 days after it had been settled. Hence, the motion to strike must be denied.

[2] (2) Since it has been made to appear to this court by the affidavit of the trial judge that the testimony heretofore set forth was inadvertently omitted from the engrossed bill of exceptions,

it is hereby ordered that such testimony be included in the engrossed bill of exceptions at the pages and lines of the engrossed bill of exceptions above indicated.

We concur: MOORE, P. J.; WOOD, J.




38 Cal.App.2d 162

**WHITE v. WHITE.**

**Civ. 12269.**

District Court of Appeal, Second District, Division 2, California.

March 25, 1940.

**Appeal and error ⇐659(3)**

Appellant's motion for diminution of record to have transcript on appeal changed by including testimony allegedly improperly omitted from engrossed bill of exceptions and excluding from engrossed bill certain testimony included therein, was denied where appellant failed to establish, to satisfaction of reviewing court, that trial court's rulings on appellant's previous motions to correct record in same particulars were erroneous. Code Civ.Proc. § 652.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mark B. White against Orrin A. White. From an adverse judgment, defendant appeals. On appellant's motion for diminution of record to have transcript on appeal changed by including certain testimony alleged to have been improperly omitted from engrossed bill of exceptions and to have excluded from engrossed bill certain testimony included therein.

Motion denied.

See, also, 100 P.2d 789.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for appellant.

T. W. Ward, of Pasadena, for respondent.

McCOMB, Justice.

This is a motion for diminution of record by appellant to have the transcript on appeal changed by including certain testimony alleged to have been improperly omitted from the engrossed bill of exceptions and to have excluded from the engrossed bill of exceptions certain testimony included therein.

Appellant twice moved the trial court to correct the record in the same particulars as he now seeks to have this court correct the same. In each instance the trial court denied the motions.

Appellant has failed to establish to our satisfaction that the rulings of the trial court were incorrect. Therefore, section 652 of the Code of Civil Procedure is inapplicable, and appellant's motion for diminution of the record is denied.

We concur: MOORE, P. J.; WOOD, J.




38 Cal.App.2d 96

**PEOPLE v. DOLAN et al.**

**Cr. 3279.**

District Court of Appeal, Second District, Division 2, California.

March 21, 1940.

**1. Criminal law ⇐1153(6)**

Whether defendants' confessions were freely and voluntarily made was for trial judge's determination, where evidence with respect to whether confessions had been freely and voluntarily given was conflicting.

**2. Criminal law ⇐1158(4)**

Where trial judge's finding that defendants' confessions were not obtained by force or coercion was supported by substantial evidence, such finding was binding upon District Court of Appeal.

**3. Criminal law ⇐865(1)**

In prosecution for first degree robbery, an instruction, which was given after jury had deliberated for some time, stating that "there should be no difficulty in arriving at a verdict in this case" was not objectionable as coercing jury into returning a verdict.

**4. Robbery ⇐24(1)**

In prosecution for first degree robbery, codefendant was not entitled to acquittal on ground that there was no substantial evidence showing that codefendant had participated in robbery, where codefendant's confession was not obtained by force or coercion and codefendant testified at preliminary hearing that he had told defendants about the job and had let defendants use codefendant's automobile and gun for purposes of committing robbery, and part of the stolen money was found in his possession.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Gordon Dolan, Earl Crawford, and Ernest Dittmar were convicted of robbery in the first degree, and they appeal.

Affirmed.

Vernon R. Hamilton, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty of robbery in the first degree after trial before the court without a jury defendants appeal. There are also appeals from the orders denying their motions for a new trial.

The essential facts are these:

March 13, 1939, defendants Crawford and Dolan entered the store of Levine Cooperage Company in the city of Los Angeles and at the point of a revolver took from the employees the company's pay roll which consisted of approximately $800. Said defendants then left the premises in an automobile. The gun and automobile used in connection with the robbery were borrowed by defendants Crawford and Dolan from defendant Dittmar, who knew the purposes for which they were to be used. At the time of defendant Dittmar's arrest there was found in his possession some of the money which had been stolen.

Defendants rely for reversal of the judgments upon these propositions:

*First: The trial court committed prejudicial error in receiving in evidence confessions of defendants.*

*Second: The trial court committed prejudicial error, after the jury had deliberated for several hours and had been returned into the courtroom for questioning as to the probability of their reaching a verdict, in making the following statement to them: "Well, this case has taken a long time to try, and we had sickness for three days and were interrupted in the course of the trial. I think if all of you ladies and gentlemen will re-read those instructions of the Court again and apply those instructions to the evidence in this case, there should be no difficulty in arriving at a verdict in this case. So you will be taken to dinner again at this time and returned here for further deliberations this evening. I don't think there should be any difficulty in arriving at a verdict in this case. Discuss it, and analyze the evidence and you will not have any trouble. You may be taken to dinner and returned here this evening and so ordered."*

Defendant Dittmar relies upon this additional proposition:

*There is no substantial evidence to show that defendant Dittmar participated in the robbery.*

[1, 2] The first proposition is untenable. There is no merit in defendants' contention that their confessions were obtained by force and coercion. It is true that defendants testified that their confessions were obtained through force and coercion. However, as opposed to this testimony was the testimony of the police officers that the confessions were freely and voluntarily made without promise of immunity or hope of reward. There was thus a conflict of evidence as to whether the confessions had been freely and voluntarily made, the determination of which question lay in the sound discretion of the trial judge; and, being supported by substantial evidence, his finding that the confessions were not obtained by force or coercion is binding upon this court. People v. Siemsen, 153 Cal. 387, 394, 95 P. 863.

[3] The second proposition is likewise untenable. Defendants' argument that the trial judge coerced the jury into returning a verdict is ludicrous. The statement in the instruction to the jury, "there should be no difficulty in arriving at a verdict in this case", gives no indication of the verdict which the judge believed should be reached or that he was coercing the jury into reaching a verdict. Cook v. Los Angeles R. Corp., 13 Cal.2d 591, 91 P.2d 118, is factually different from the instant case and therefore inapplicable.

[4] Defendant Dittmar's final proposition is wholly devoid of the slightest semblance of merit and should never have been presented to this court. In addition to defendant Dittmar's confession he testified at the preliminary hearing relative to his connection with the crime as follows:

"I told these two boys about this job. I was home at the time it was committed, but I let them use my car and my gun, a .32 automatic, but I wasn't in it, actually.

"Q. Did you know they were going to use the gun for the purpose of committing any robbery? A. Yes, your Honor."

The urging of such groundless appeals as that in the instant case tends not only to waste the time of the courts, which is equivalent to wasting the money of the taxpayers, but also to reflect discredit upon the integrity of the legal profession.

For the foregoing reasons the judgments and orders are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.




38 Cal.App.2d 88

## DEMPSEY REALTY CO. v. OXFORD APARTMENTS CORPORATION et al.

Civ. 11334.

District Court of Appeal, First District, Division 2, California.

March 21, 1940.

**Constitutional law** ⇐305

The statute dispensing with recording of notice of default before exercising power of sale in trust deed given to secure payment of bonds authorized by the corporation commissioner is not unconstitutional as discriminatory. Civ.Code, § 2924.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by the Dempsey Realty Company against the Oxford Apartments Corporation and others, to quiet title to certain real property known as the Oxford Apartments. Judgment for defendants, and plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Arch H. Vernon, Earl E. Johnson, and Lawrence L. Otis, all of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff brought this action alleging that it was the owner of certain real property known as the Oxford Apartments and seeking to quiet its title thereto. Defendant Oxford Apartments Corporation filed its answer alleging that it was the owner of said property and the remaining defendants filed answers claiming interests derived through defendant Oxford Apartments Corporation. The trial court entered its judgment in favor of defendants and from said judgment plaintiff appeals.

The facts are not in dispute. Plaintiff acquired said property subject to a deed of trust given to secure a bond issue of $110,000. A permit for the sale of the bonds, secured by said deed of trust, had been obtained from the commissioner of corporations and said bonds had been sold pursuant to said permit. Default was made in the payment of said bonds and a sale was conducted pursuant to the terms of said deed of trust. The title and interests of the defendants were based upon said sale.

Plaintiff concedes that said sale was conducted as provided in said deed of trust but claims that it was wholly void because no notice of breach and election to sell was recorded three months before the sale. The sale had been conducted without the recordation of such notice, the parties relying upon the exception to the general requirement for such recordation, which exception is expressly stated in section 2924 of the Civil Code, and reads "except where such mortgage or transfer is made * * * to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations * * *".

The sole basis of plaintiff's contentions on this appeal is that the above-quoted portion of said section 2924 of the Civil Code is unconstitutional. Every point raised is completely answered in the opinion in Berry Hotels System v. Capitol Properties, Inc., 9 Cal.2d 12, 68 P.2d 974, which opin-

ion was filed during the pendency of this appeal. The judgment may be affirmed without further discussion on the authority of that case.

The judgment is affirmed.

We concur: NOURSE, P. J., STURTEVANT, J.




38 Cal.App.2d 170

## PINE GROVE CONSOL. MINES, Inc., v. METSON et al.

Civ. 11117.

District Court of Appeal, First District, Division 2, California.

March 26, 1940.

Hearing Denied May 25, 1940.

**1. Mines and minerals ⇐53**

In corporation's action to recover damages for repudiation of option to carry on mining operations, burden was on plaintiff to prove anticipated profits lost by it.

**2. Evidence ⇐570**

Where party relies on expert testimony alone to prove fact not exclusively within experts' knowledge, trial court is not bound to accept such testimony and reject matters of common knowledge, presumptions, and inferences, any of which would support finding contrary to expert testimony.

**3. Appeal and error ⇐931(1)**

On appeal from judgment awarding appellant unsatisfactory amount as damages for respondents' repudiation of mining option, appellate court must assume in support of judgment that trial court rejected mere guesswork testimony of poorly qualified expert witnesses on issue of anticipated profits lost by appellant to extent of holding that such testimony was not sufficiently reliable to be accepted as substantial proof of such profits.

**4. Evidence ⇐571(7)**

A trial court is not bound by witness' estimate of reasonable value of his services as attorney.

**5. Mines and minerals ⇐53**

In corporation's action to recover damages for repudiation of mining option, testimony of attorney, who assigned option to plaintiff, as to amounts paid by witness for option and plaintiff's incorporation, amount of his expenses, and reasonable value of legal advice given by him, *held* insufficient to establish inadequacy of amount awarded plaintiff by judgment.

**6. Appeal and error ⇐843(1)**

Defendants' right to be heard, in absence of appeal by them, on plaintiff's appeal from judgment for unsatisfactory amount, is merely academic question not calling for decision.

---

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Pine Grove Consolidated Mines, Incorporated, against W. H. Metson and another, to recover damages for repudiation of a written mining option. From a judgment for plaintiff in an unsatisfactory amount, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., and PETERS, J., pro tem., dissenting.

Charles Baer, C. C. Sullivan, and Hy Schwartz, all of San Francisco, for appellant.

Francis W. Murphy and P. H. McCarthy, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to recover damages by way of money expended and for profits which might have accrued if defendants had permitted plaintiff to carry on mining operations under a written option repudiated by defendants. Plaintiff had judgment for $1,250, but has brought this appeal seeking a larger award.

It is plaintiff's theory that the written option was executed in bad faith in that the defendants, knowing they did not have the power or authority, executed the option purporting to act as president and assistant secretary of the Pine Grove Gold Mining Company; and that, before the plaintiff discovered the misrepresentations and learned that the option was invalid, it had made expenditures preparatory to the prosecution of mining operations on the property and suffered the loss of anticipated profits from which they were deprived by defendants' repudiation. The trial court found for plaintiff on the issue of bad faith and also found that plaintiff was at all times ready and able to exercise the option.

[1-3] On this appeal the first issue raised by appellant is that the trial court erred in refusing recovery of anticipated profits on the ground that appellant had failed to prove the issue. It would serve no purpose to recite the testimony of the various witnesses. Appellant depended upon that of experts who gave their estimates of the quantity and value of the ore in place and on the dumps, the estimated costs of mining and handling the ore, and the possible return or profits. The respondents disputed these estimates and attacked the experience and training of those called by appellant as expert witnesses. The trial court was left with nothing in the way of direct evidence, while the opinions and conjectures of the appellant's witnesses were far from convincing. We are unable to find any evidence in the record which we can point to as proving any of the items above referred to, and the appellant does not cite any such evidence for us. The issue was raised by the allegation in the complaint that, by reason of the acts of the defendants, the plaintiff had been deprived "of divers great gains and profits which otherwise would have accrued to it". This allegation the trial court found to be untrue, and if the finding is sound there is an end to the argument. The position which the appellant assumes is that the trial court should have believed the testimony of the witnesses called by the appellant, and should have accepted that as conclusive proof. But here there is the added difficulty that the burden of proof of the issue was on the appellant and that, since it depended entirely upon expert testimony to prove an issue that was not entirely within the knowledge of an expert, the trial court was first confronted with a determination of the qualifications of the witnesses and then with the determination of whether, from all the circumstances of the trial, their testimony was worthy of belief. If a party relies upon expert testimony alone to prove a fact which is not exclusively within the knowledge of experts, the trial court must not be held bound to accept such expert testimony and reject matters of common knowledge, presumptions, and inferences, any of which would support a finding contrary to the expert testimony. Upon an examination of the record here, and after reading the testimony of appellant's witnesses, we are satisfied that the trial court did not err if it treated this expert testimony as mere guesswork of poorly qualified witnesses. We must assume in support of the judgment that the trial court did so reject it to the extent of holding that it was not sufficiently reliable to be accepted as substantial proof of the issue.

[4, 5] Appellant also attacks the judgment in so far as it limits the amount recoverable to $1,250. This is another instance of failure of proof on the part of one upon whom the burden rested. The option which is the basis of the dispute was granted to Hy Schwartz, an attorney at law. He assigned to the appellant herein. His testimony alone is cited to prove the damages. He testified to the payment of $500 to Mr. Metson for the option, $250 for incorporation of appellant, and minor items of $135 and $67. He then testified that the corporation was liable to him for $1,750—$250 for expenses and $1,500 for advice. It was not shown that either of these sums was paid or contracted for. If the witness rested on the reasonable value of his legal services the trial court was, of course, not bound by his estimate. We find no error here, and appellant has not been diligent in an effort to point to error.

The request that we make new findings and increase the judgment is left with the observation that the evidence is not such as would support the findings that appellant requests, assuming that we might have the power to make them.

[6] Respondents' demand that we reverse the entire judgment without their having taken an appeal is passed with the observation that they have shown no ground for a reversal. Their argument on this phase of the case is directed to the question of their right to be heard in the absence of an appeal, but this question becomes merely an academic one which does not call for decision at this time.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

## PEOPLE v. STANFORD.*

Cr. 450.

District Court of Appeal, Fourth District, California.

March 25, 1940.

1. Embezzlement ⇐4
False pretenses ⇐20
Larceny ⇐1

Under grand theft statute, "grand theft" may consist of larceny, embezzlement, or obtaining money or other property under false pretenses. Pen.Code, §§ 484, 503; § 487, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

2. Larceny ⇐15(1)

Undisputed facts disclosing that trustee used trust funds to pay for property purchased by trustee personally excluded the crime of "larceny", since there was no felonious taking and carrying away of the personal property of another. Pen.Code, §§ 484, 503; § 487, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

3. Larceny ⇐3(2)

In "larceny," felonious intent exists at the time of the taking.

4. Larceny ⇐14(1)

It is the essence of "larceny by trick or device" that the owner of the property shall intend to part with possession only and not to pass title as well.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny by Trick or Device".

5. Larceny ⇐14(1)

Where trustee had possession of funds under trust and beneficiary of trust intended to approve investment of funds in property purchased by trustee personally and take some form of security from trustee, that trustee used trust funds to pay for property purchased by trustee personally and did not immediately give security did not establish "larceny by trick or device". Pen.Code, §§ 484, 503; § 487, subd. 1.

6. False pretenses ⇐20

The offense of obtaining money under false pretenses is included in grand theft. Pen.Code, § 484; § 487, subd. 1.

7. False pretenses ⇐49(3)

Where trustee had possession of funds under trust and beneficiary of trust intended to approve investment of funds in property purchased by trustee personally and take some form of security from trustee, and trustee used trust funds to pay for the property but did not immediately give security, offense of "obtaining money under false pretenses" was not supported by evidence since there was no false representations of any existing or past fact on part of trustee. Pen.Code, §§ 484, 503; § 487, subd. 1.

8. Embezzlement ⇐4

The offense of embezzlement is included in the crime of grand theft. Pen.Code, §§ 484, 506; § 487, subd. 1.

9. Embezzlement ⇐5

To support a charge of "embezzlement", it must appear that the intent to misappropriate the property was formed after the defendant obtained possession of the property. Pen.Code, § 506.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

10. Embezzlement ⇐42

Where defendant came into possession of property allegedly embezzled when he qualified as administrator and continued in possession as trustee after distribution of estate and invested money by using it in connection with the purchase of a home for himself under consent of beneficiary, circumstantial evidence was admissible to show that defendant formed fraudulent intent to misappropriate fund immediately after he came into possession as administrator and that by reason thereof beneficiary's consent was vitiated. Pen.Code, § 506.

11. Embezzlement ⇐1

Acts or conduct constituting actual civil fraud within meaning of Civil Code, when accompanied by necessary criminal intent, may become "embezzlement". Civ.Code, § 1572, subd. 4; Pen.Code, § 506.

12. Embezzlement ⇐1

"Embezzlement" is a breach of trust, but not every breach of trust is embezzlement. Civ.Code, § 1572, subd. 4; Pen.Code, § 506.

13. Trusts ⇐231(1, 2)

A trustee may not lawfully use trust property for his own private or individual

*For subsequent opinion see 105 P.2d 969.

purposes, but a trustee may, by express agreement with his beneficiary, in good faith buy or borrow trust property.

**14. Embezzlement ⇐11(1)**

An appropriation of property to a use authorized by the owner cannot constitute "embezzlement".

**15. Trusts ⇐231(1)**

Where trust beneficiary authorized trustee to use trust funds for purchase of property by trustee individually with understanding that trustee was to execute mortgage but time for execution of mortgage was not specified, obligation to execute mortgage within a reasonable time was implied.

**16. Trusts ⇐233**

Even if conversion of trust funds by trustee was unauthorized by beneficiary, trustee was still liable to beneficiary for the full amount of trust funds.

**17. Trusts ⇐231(1)**

Any advantage or profit received by a trustee through the use of trust property is deemed in law to belong to the beneficiary, and the trustee must account to the beneficiary for all the benefits which the trustee himself obtains by virtue of the relationship.

**18. Trusts ⇐237**

Where trust beneficiary allegedly consented to trustee's use of trust funds in purchase of property for trustee individually, beneficiary had as against trustee not only legal remedies against borrower, but also powers of equity court to protect beneficiary against any violation of trust and to prevent any impairment of trust funds and, in case of diversion by trustee, to enforce restitution thereof.

**19. Criminal law ⇐552(3)**

Where a case is one of circumstantial evidence, to justify a conviction the facts must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational conclusion.

**20. Embezzlement ⇐44(1)**

Evidence that defendant came into possession of property as administrator, that he continued in possession as trustee, that he used trust funds, with beneficiary's consent, to purchase property for himself with understanding that he was to execute a mortgage, that he delayed in executing mortgage, that mortgage did not cover entire property purchased, that property not mortgaged was of relatively small value, that mortgaged property was improved by trustee and was of a value exceeding mortgage, and that mortgage did not provide for personal liability of trustee, was insufficient to sustain conviction of "embezzlement." Pen. Code, §§ 506, 1096.

**21. Criminal law ⇐561(1)**

A defendant should not be convicted on mere suspicion or even a strong probability of guilt, but every element of crime charged should be established to a moral certainty and beyond a reasonable doubt. Pen.Code, § 1096.

**22. Attorney and client ⇐106**
**Trusts ⇐179**

An attorney or trustee is under duty to protect interests of client or beneficiary with due care, skill, and diligence as long as fiduciary relationship exists between them.

---

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Leland G. Stanford was convicted of grand theft, and he appeals.

Reversed.

Bertrand L. Comparet and Clarence Harden, both of San Diego, for appellant.

Earl Warren, Atty. Gen., by Eugene M. Elson, Deputy Atty. Gen., and James B. Abbey, Dist. Atty., by Seymour Wurfel, Deputy Dist. Atty., both of San Diego, for respondent.

THOMPSON, Justice pro tem.

The appellant was charged in an indictment returned by the grand jury of San Diego county with the crime of grand theft in each of five counts. A jury trial was waived by the appellant and the case was tried by the court sitting without a jury. The court found appellant guilty on the first three counts and not guilty on counts four and five of said indictment. A motion for a new trial was made and denied. Upon appellant's application for probation the imposition of sentence was suspended for two years and he was placed on probation. He appeals from the order denying his motion for a new trial.

The facts are somewhat complicated and a concise statement of the essential details thereof is necessary to afford a proper understanding of the issues involved.

Jennie V. Stevens is the widow of Edwin R. Stevens, deceased, who died June 2, 1935. She had been a friend of Mrs. Edith H. Christy for 40 years. After her husband's death Mrs. Stevens consulted appellant, who is an attorney at law, upon the recommendation of Mrs. Christy, who had known appellant since his childhood. Mrs. Stevens was then about 75 years old and unaccustomed to business dealings. Upon advice of appellant Mrs. Stevens applied for letters testamentary of her deceased husband's estate and was appointed and qualified as executrix, appellant acting as her attorney. Mrs. Stevens testified that she thought appellant afterwards suggested that she resign as executrix and let him act as administrator with the will annexed because she did not understand business matters. The written resignation prepared by appellant and signed by Mrs. Stevens stated that she was resigning because of ill health, although she testified that her health was perfect. However, Mrs. Christy testified that Mrs. Stevens "wasn't very well". Appellant was appointed and qualified as administrator with the will annexed, administered the estate, and in May, 1936, a decree of distribution was entered distributing the residue of the estate, valued at more than $12,000, to Mrs. Stevens. Sometime previous Mrs. Stevens had lost some money through bad investments and lack of business knowledge, and many discussions were had by appellant, Mrs. Stevens and Mrs. Christy concerning the care of the property, culminating in the creation of a trust. On March 5, 1936, and before the estate was closed, Mrs. Stevens, at the suggestion of appellant, executed trust indentures whereby she conveyed to appellant as trustee, all of her property, including that comprising the estate, in trust for her life, and upon her death to distribute the remainder to designated persons. The evidence indicates that the assets of the estate were not actually delivered to Mrs. Stevens upon distribution of the estate, but appellant held them under the trust. Mrs. Stevens testified that she did not recall having had any conversation with appellant concerning the creation of the trust. She stated that she just glanced over instruments which appellant asked her to sign before signing them and that it did not "sink in very deep", but that she signed everything appellant gave her to sign; that she had the utmost confidence in him. Mrs. Christy's testimony, however, is to the effect that, prior to the execution of the trust indentures, numerous conferences were held by appellant, Mrs. Stevens and herself about the care of the property and the creation of a trust for that purpose. The evidence further shows that Mrs. Christy also consulted her friends and some of Mrs. Stevens' relatives about the matter. She stated that, just before Mrs. Stevens signed the trust indentures, she (Mrs. Christy) told Mrs. Stevens that she didn't think it was the thing to do and that they ought to think more about it, but that Mrs. Stevens, however, signed the trust indentures in her presence. During one of these discussions Mrs. Christy asked appellant about the possibility of obtaining an annuity for Mrs. Stevens, but he did not advise it because it would use up the principal. Appellant testified that Mrs. Stevens wanted to keep the principal intact. However, in his letter to her dated May 18, 1936, appellant told her that, if she wished to use some of the principal, it would be possible "under circumstances that seem advisable". Mrs. Christy testified that appellant told Mrs. Stevens and her that he knew where he could make a good loan with the money of the estate; and afterwards took them to look at a residence and grounds on Palm street in San Diego, and spoke of using it as a home for himself and his family; and said that, if it was satisfactory to Mrs. Stevens, he would give her a mortgage on the place; and that Mrs. Stevens expressed satisfaction with the property as security for a loan. A letter or document was later prepared by appellant dated July 18, 1936, purporting to authorize appellant to use $10,560 of the trust funds to purchase this property for himself, the repayment to be secured by a mortgage under which he would pay to Mrs. Stevens $44 per month as the equivalent of 5 per cent interest on $10,560. Mrs. Christy testified that she and Mrs. Stevens read the letter before it was signed by Mrs. Stevens and by herself as a witness; that appellant did not advise Mrs. Stevens to make that investment; but "just left it up to her, asked her if she wanted to do it. * * * The idea was this, Aunt Jennie (Mrs. Stevens) felt that if he took the place for his own home, she liked the place, she felt that he would stay in it and pay the income steadily and she could depend upon it. She wanted to let him have it". Mrs.

Stevens testified that appellant did not tell her when he would give her the mortgage, nor does the letter specify any time.

No mortgage was executed on the Palm street property until September 16, 1937. It was not delivered to Mrs. Stevens and was not recorded until April 21, 1939, which was after a state bar investigation into the matter was begun. Appellant testified that he knew nothing about the investigation until May 3, 1939. The mortgage covered only a little more than one lot upon which the house and garage were situated and omitted practically all of five other lots which were part of the parcel of land sold to appellant in the deal and which were then unimproved. The mortgage was a novel one and contained some unusual provisions. Under its terms the mortgagors (appellant and his wife) agreed to pay to Mrs. Stevens $45 per month "which sum is understood to be the equivalent of interest at the rate of 5 per cent (5%) per annum on the sum of ten thousand eight hundred dollars ($10,800.00), but not actually to be interest on any obligation * * * said mortgagors are not, * * * obligated in any way whatsoever either by promissory note, oral promise or any promise at all, to pay to the Mortgagee any sum of money whatsoever". The sole security of the mortgagee was to be the mortgage. A period of ninety days' grace was allowed on each payment. The mortgagee was given the right of foreclosure ninety days after August 15, 1946. The amount specified in the mortgage included additional monies of Mrs. Stevens not involved in the first three counts of the indictment. No promissory note or other evidence of indebtedness was executed. In appellant's escrow instructions relating to the purchase of the Palm street property by him no mention is made of any mortgage, nor of any interest in the property on the part of Mrs. Stevens, nor about any mortgage clause to be attached to the fire insurance policy.

On July 18, 1936, appellant, as trustee, drew a check on the trust account for $500 and paid it into escrow as the initial payment on the purchase price of the Palm street property. This is the basis of count one of the indictment. On July 26, 1936, appellant, as trustee, drew a check on the trust account for $7,458.80, being the entire balance of said trust account in the bank, and paid it into said escrow, together with $2,041.20 which he borrowed personally from the bank, as the balance of said purchase price of $10,000. The use of said sum of $7,458.80 is the basis of the second count of the indictment. Thereafter, as amounts of trust funds came into appellant's hands, he applied them to his own use up to the amount he had paid in personally to purchase the Palm street property, and the total amount of these items, namely, $2,041.20, form the basis of the third count of the indictment.

The portion of section 484 of the Penal Code of California material to this case is as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property * * * is guilty of theft. * * *"

[1-7] And subdivision 1 of section 487 of the Penal Code provides that it is grand theft when the money or other property taken is of a value exceeding $200. Embezzlement is defined as "the fraudulent appropriation of property by a person to whom it has been entrusted". Pen.Code sec. 503. Under the provisions of this statute grand theft may consist of any one of the following three crimes: larceny, embezzlement, and obtaining money or other property under false pretenses. The undisputed facts of the case excluded the crime of larceny. There was no felonious taking and carrying away of the personal property of another. In larceny the felonious intent exists at the time of the taking. 10 Cal.Jur. p. 240, sec. 4; People v. Jackson, 138 Cal. 462, 464, 71 P. 566. Respondent urges that the acts of appellant fall within the definition of larceny by trick or device. However, it is the essence of larceny by trick or device that the owner of the property shall intend to part with possession only and not to pass title as well. People v. Woolsey, 13 Cal.App. 2d 54, 58, 56 P.2d 557. The facts in the instant case disclose without controversy that the appellant already had possession under the trust and Mrs. Stevens intended to approve the investment of the funds and take some form of security from the appellant. Nor is the offense of obtaining money under false pretenses (which is included in grand theft) supported by the evidence, for there were no false rep-

resentations of any existing or past fact on the part of appellant. People v. Wasservogle, 77 Cal. 173, 175, 19 P. 270.

[8] There remains for consideration the offense of embezzlement, which is also included in the crime of grand theft charged in the indictment; and the main issue on this appeal is whether or not the evidence is sufficient to sustain the judgment of guilty of embezzlement as to each of the first three counts. Section 506 of the Penal Code defines embezzlement as follows: "Every trustee, * * * attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, * * * is guilty of embezzlement."

[9] In order to support a charge of embezzlement "it must appear that the intent to misappropriate the property was formed after the defendant obtained possession of the property, for if the intent existed at the time the possession was obtained, the offense would be larceny". 10 Cal.Jur., p. 264, sec. 23. Appellant came into possession of the property alleged to have been embezzled, when he qualified as administrator with the will annexed of the estate of Edward R. Stevens, deceased, and he continued in possession as trustee after distribution of the estate. He came into possession lawfully. He invested the money by using it in connection with the purchase of a home for himself. The letter of July 18, 1936, purported to give him the consent of the owner. It remains to determine whether or not this was a fraudulent appropriation of the property to a use or purpose not in the due and lawful execution of his trust.

[10] It is the major contention of respondent that such a fraudulent appropriation on the part of appellant may be inferred from the circumstances surrounding the whole transaction, as shown by the evidence, and that such fraudulent intent was formed by appellant immediately after he came into possession of the property as administrator with the will annexed of the estate, and that, by reason thereof, Mrs. Stevens' consent to the agreement of July 18, 1936, purporting to give appellant authority to do the acts with which he is charged in the indictment was vitiated and the contract was thus rendered void ab initio. Such circumstantial evidence is admissible for that purpose. People v. Hill, 2 Cal.App.2d 141, 164, 37 P.2d 849. A similar view was expressed by the trial court in denying appellant's motion for a new trial, namely, that the acts and conduct of the appellant indicated that he entered into the agreement of July 18, 1936, without any intention of performing it and therefore was guilty of actual fraud as defined in subdivision 4 of section 1572 of the Civil Code, in that, at the time he entered into said agreement, he had no intention of executing the mortgage in the immediate future, nor of including the unimproved portion of the Palm street property in such mortgage.

[11, 12] It is true that acts or conduct constituting actual civil fraud within the meaning of said section, when accompanied by the necessary criminal intent, may become embezzlement. 18 Am.Jur., p. 583, sec. 24; People v. Wilson, 130 Cal.App. 760, 765, 20 P.2d 748. But neither the statutes nor the courts have obliterated the distinction between fraud which affords only a civil remedy and fraud which constitutes a crime. Embezzlement is a breach of trust, but not every breach of trust is embezzlement. "The statutes were not intended to cover every breach of trust, nor every fraudulent breach of trust, and render it a criminal offense." 20 Cor.Jur., p. 423, sec. 12; 18 Am.Jur., p. 580, sec. 19. As pointed out in People v. Ranney, 213 Cal. 70, 77, 1 P.2d 423, 426: "'Countless decisions might be cited to show that an act may be unlawful and not be penal. * * * 39 Cyc. 829. The word unlawful in connection with a contract for the use of a machine, does not mean a criminal use, but any use in violation of the contract. * * * Unlawful in relation to the acts of a corporation may mean acts only ultra vires. * * * Unlawful is not synonymous with criminal, "To speak of an act as unlawful is not equivalent to saying it has been denounced as a crime." * * * "Many things are unlawfully done which are not crimes because the criminal intent is wanting."'"

Let us apply these principles of law to the evidence in this case. The arrangements which Mrs. Stevens made with appellant had two main purposes, one, to prevent ill-advised business dealings on her part, as she was inexperienced in the way of business and had lost some money in unbusinesslike transactions; and second,

to invest her money in some mortgage or other obligation which would provide for her a fixed, steady, monthly income at a higher rate of interest than government bonds or other similar safe but low-yield investments, on which she could live without depleting the principal of her assets. These objects were greatly desired by Mrs. Stevens and her friend and adviser, Mrs. Christy. Appellant, as administrator, with unusual diligence, had brought into the estate considerable sums of money from assets of doubtful value, some of which were already barred by the statute of limitations, and others were about to be outlawed, and placed in good standing obligations owing to the estate, as well as obligations owing to Mrs. Stevens not included in the estate. The evidence indicates that appellant suggested the creation of the trust under which he, as trustee, was given complete charge of Mrs. Stevens' property, and that he was the first to mention a loan to himself, but it also discloses that Mrs. Stevens had independent advice. On most occasions when business affairs were transacted with appellant, she was accompanied by her intimate friend and adviser, Mrs. Christy, and Mrs. Stevens and Mrs. Christy often talked with friends and with Mrs. Stevens' relatives about her financial affairs before the transactions were closed. Apparently there was no attempt on the part of appellant to conceal facts from Mrs. Stevens or her relatives or friends and appellant occasionally rendered an accounting to his beneficiary of all assets, receipts and disbursements.

[13, 14] While it is an elemental principle of law of trusts that a trustee may not lawfully use the trust property for his own private or individual purposes (25 Cal. Jur., p. 342, sec. 190), still a trustee may, by express agreement with his beneficiary, in good faith, buy or borrow the trust property (65 Cor.Jur., p. 888, n. 71c; Gregg v. Gabbert, 62 Ark. 602, 37 S.W. 232; Heath v. Tucker, 153 Mo.App. 356, 134 S.W. 572, 576), and an appropriation of property to a use authorized by the owner cannot constitute embezzlement. Carroll v. Pacific Coast Automobile Assn., 123 Cal.App. 568, 571, 11 P.2d 660; People v. Deyot, 86 Cal. App. 53, 54, 260 P. 301. The matter of the loan to appellant was talked over a number of times by appellant and Mrs. Stevens together with Mrs. Christy and they inspected the Palm street property a number of times before the agreement of July 18, 1936, was entered into. By the terms of this agreement or letter appellant was authorized to use $10,560 of the trust funds to purchase the Palm street property. Mrs. Stevens was to have a first mortgage on the property. Appellant was not to be personally liable for any part of that sum and her only security was to be the mortgage on the house, but appellant would occupy the premises and pay Mrs. Stevens $44 per month, being equivalent to five per cent per year on said sum of $10,560. The evidence shows that appellant told Mrs. Stevens that he was preparing to terminate the trust as authorized in her letter of July 8, 1936, but the record discloses that the trust never was terminated. At the time appellant purchased the Palm street property there was only $7,958.80 of the trust funds available. This amount was used to apply on the purchase price and appellant made up the balance out of his own funds. He began to pay interest on the full amount of $10,560 immediately and continued to do so throughout the period of time involved in this case.

[15] The type of security given by appellant to Mrs. Stevens was certainly not the kind that would satisfy an experienced business man, nor the kind that an attorney would ordinarily advise his client to accept. But in his testimony appellant stated that his reason for not giving Mrs. Stevens a promissory note was that she would "go right out and dispose of it tomorrow and cancel the whole purpose of the trust". He testified that he offered to terminate the trust if Mrs. Stevens so desired, but insisted on doing so only by court order. Appellant explained the delay in executing the mortgage by stating that Mrs. Stevens and he agreed that "the mortgage was to be issued when the total $10,560 was secured by me, when it came into my hands. That time did not come until practically a year later." There was some delay after the full amount had been received, which he explained by stating that it required some time to go over the correspondence and files in regard to the mortgage and he was very busy with other matters. No time was specified orally or in the authorization of July 18, 1936, as to when the mortgage was to be executed. It was therefore implied that the mortgage would be executed within a reasonable time. Appellant gave the following reasons for not recording the mortgage at once: That Mrs. Stevens and he had been

talking about terminating the trust because some of her relatives were dissatisfied with the trust arrangement; that Mrs. Stevens had been talking about spending some of the principal and he contemplated closing the trust and paying her all the money, which he anticipated would occur within a very short time. The evidence indicates that he was financially able to do so upon demand. He also testified that the trust was for her benefit, to prevent her from unwisely disposing of her assets, as she was inclined to do; that she gave $1,500 to one of her daughters, $100 to another relative and on another occasion tried to buy a cow for a neighbor; also that, if the mortgage were put on record, "it would give Mrs. Stevens an opportunity to assign to a bona fide purchaser for value her interest in the mortgage and defeat in part the trust." He gave as an additional reason the fact that he "could see no value, since I had the legal title in trust to all of Mrs. Stevens' assets, of putting a mortgage on record".

There is a conflict of evidence as to how much of the Palm street land was to be included in the mortgage. Mrs. Stevens and Mrs. Christy testified that appellant did not tell Mrs. Stevens that the mortgage would cover only the buildings and land immediately surrounding them. Appellant testified that Mrs. Stevens consented to that. However, the undisputed evidence shows that the portion not included in the mortgage slopes steeply down into a canyon and was assessed at $200, and the highest appraisement given by appraisers who checked its value was $500. The purchase price for the entire property was $10,000. There is evidence that, within a short time after appellant purchased it, and before he made any improvements on the property, he was offered $13,500 for the portion included in the mortgage. Later, appellant spent $2,000 for improvements on the mortgaged portion. Mrs. Stevens' security was therefore increased in value but reduced in area. Assuming that Mrs. Stevens did not consent to the exclusion of any of the lots, it was a civil breach of contract but, under the circumstances, could it be said to be a criminal fraud? Financially Mrs. Stevens had not been damaged. If appellant had sold or encumbered the property and disposed of the proceeds, or if he had mortgaged the unimproved portion of the property and excluded the improved part, no doubt he would have been guilty of embezzlement. At the time of the indictment appellant still had in his possession and control all of the property purchased with the trust funds. He had never put it beyond his control, and there is evidence to the effect that appellant was at all times ready, able and willing to turn over to his beneficiary the full amount of the trust funds thus appropriated, together with all other assets of the estate, upon a legal termination of the trust, if Mrs. Stevens so desired.

[16-18] Even if such conversion of the trust funds was unauthorized by the beneficiary, he was still liable to her under the law for the full amount of the trust fund. People v. Page, 116 Cal. 386, 395-396, 48 P. 326; People v. Royce, 106 Cal. 173, 176, 37 P. 630, 39 P. 524. Although in the letter of July 18, 1936, appellant purported to deal in his individual capacity, and not as trustee, and he was to have no personal responsibility, still the trust had not been terminated and it was still in effect. Irrespective of that agreement he was still trustee of her property and the law required him to account to his beneficiary on demand for all property and funds which came into his hands as such trustee. 65 Cor.Jur. pp. 878, 879, sec. 778; pp. 885, 886, sec. 784; p. 887, sec. 786; Schneider v. Moncur, 30 Cal.App. 734, 740, 159 P. 459. Any advantage or profit received by a trustee through the use of trust property is deemed in law to belong to the beneficiary, and the trustee must account to the cestui for all the benefits which the trustee himself obtains by virtue of the relationship. Purdy v. Johnson, 174 Cal. 521, 529, 163 P. 893; Bone v. Hayes, 154 Cal. 759, 767, 99 P. 172. Mrs. Stevens had as against appellant not only the legal remedies against a borrower, but also the powers of a court of equity to protect her against any violation of the trust and "to prevent any impairment of the trust fund, and in case of diversion or misappropriation of such fund by the trustee, to direct a restitution thereof, and to enforce such direction by some process appropriate to the exercise of its jurisdiction". 25 Cal.Jur. pp. 137, 138, sec. 14.

Respondent complains that appellant failed to protect Mrs. Stevens by not having her interest appear on the fire insurance policy obtained by him covering the Palm street property, and argues that, if there had been a fire loss, she could not have recovered any sums paid under the policy. But, under such circumstances, the law would have protected her and would have

held him accountable to her as trustee for any insurance money so recovered. The investment of the trust funds in the Palm street property merely resulted in a change in the form of the trust property.

[19-21] We have discussed the evidence somewhat at length because it is respondent's contention that a felonious intent on the part of appellant at the time he used the trust funds involved in the case is established by the circumstantial evidence adduced at the trial. As pointed out in 8 Cal.Jur. page 371, section 405, "When a case is one of circumstantial evidence, and admits of a theory either of guilt or innocence" the rule is that "to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational conclusion". People v. Raber, 168 Cal. 316, 319, 143 P. 317. The rule is sometimes expressed as follows: "if two opposing conclusions can with equal propriety be drawn from the evidence, one consistent with guilt, and the other consistent with innocence, the latter should be adopted." 8 Cal.Jur. p. 372, sec. 405; People v. Corey, 8 Cal.App. 720, 727, 97 P. 907. We have come to the conclusion that any inference of criminal intent that could be reasonably drawn from the facts and circumstances of this case is not strong enough to overcome the presumption of innocence, which is one of the strongest presumptions provided by our statutes. There is a reasonable inference of negligence on the part of the appellant and no doubt a reasonable inference could be drawn from the evidence that he took an improper advantage of the fiduciary relationship existing between himself and a trusting client and beneficiary, but not such an inference of a felonious intent as to repel the presumption of innocence. Appellant is charged in each count with a crime of a very serious nature and he should not be convicted on mere suspicion or even a strong probability of guilt, but every element of the crime should be established to a moral certainty and beyond all reasonable doubt. We feel that he cannot stand convicted on the record in this case without doing violence to the presumption of innocence and the doctrine of reasonable doubt. Pen. Code, sec. 1096, and it is our conclusion that the evidence does not sustain the judgment of guilty as to any of the first three counts of the indictment. This conclusion obviates the necessity of reviewing the other contentions urged by the respective parties to the case.

[22] We desire to state unqualifiedly that we do not condone or excuse in the slightest degree any act of an attorney or trustee which constitutes a breach of professional or business ethics, although not a violation of any penal statute. It is his solemn duty to protect the interests of a client or beneficiary with due care, skill and diligence as long as such a fiduciary relationship exists between them; and we believe that, even with the consent of the client or beneficiary, no attorney or trustee should use the property of his client or beneficiary in any manner for his own benefit unless such client or beneficiary previously has the advice of independent counsel concerning the transaction. But in this case the court is not dealing with a problem of professional or business ethics, but only with the question of whether or not the evidence sustains the judgment.

The order appealed from is reversed.

We concur: BARNARD, P. J.; MARKS, J.




## DILLON v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES et al. *

Civ. 12419.

District Court of Appeal, Second District, Division 2, California.

March 25, 1940.

Rehearing Denied April 15, 1940.

Hearing Granted May 23, 1940.

**1. Limitation of actions ⇐34(1)**

A claim against a city for a pension is on a liability created by statute, and, in absence of an express charter provision fixing a time within which an action may be filed to enforce the right to a pension, it is subject to the statutory limitation of three years. Code Civ.Proc. § 338, subd. 1.

**2. Mandamus ⇐143(1)**

The statute of limitations may be relied as a defense in a special proceeding for a writ of mandate.

* For subsequent opinion, see 109 P.2d 660.

**3. Municipal corporations ⇐220(9)**

It is an essential element of a cause of action for a pension against the city of Los Angeles to allege and prove that a claim for the pension has been presented and rejected in accordance with charter requirements, and no suit can be maintained on such a claim unless it was presented to the city or the appropriate board within six months after the last item sued on accrued.

**4. Limitation of actions ⇐58(2)**
**Municipal corporations ⇐187**

Where application of Los Angeles policeman's widow for a pension was denied by board of pension commissioners on February 26, 1935, proceeding commenced on December 5, 1938, for a writ of mandate requiring city and board to award widow a pension was barred by three-year statute of limitations, and, in absence of any allegation that any subsequent claim or demand for a pension was filed with city or board, there was a total absence of the allegation of an essential fact to support a cause of action for a pension. Code Civ.Proc. § 338, subd. 1.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Petition by Virginia M. Dillon against the Board of Pension Commissioners of the City of Los Angeles and Irving H. Hellman and others, as members of the Board of Pension Commissioners of the City of Los Angeles, for a peremptory writ of mandate requiring respondents to award petitioner a pension. From a judgment of dismissal, petitioner appeals.

Affirmed.

Pollock & Pollock, Edward I. Pollock, and David Pollock, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment of dismissal entered in favor of respondent predicated upon the sustaining of a demurrer without leave to amend to the first amended petition for a peremptory writ of mandate requiring respondents to award petitioner a pension, petitioner appeals.

The petition, after setting forth the capacity of respondents, alleges:

"II. That your petitioner was the lawfully wedded wife of the deceased, Arnold G. Dillon, and had been married to said Arnold G. Dillon since December 25th, 1930; and continuously to the date of the death of the said deceased Arnold G. Dillon; that your petitioner is now the lawful widow of the said deceased Arnold G. Dillon, and has not remarried since the death of her aforesaid husband.

"III. That said deceased Arnold G. Dillon, was, at the time of his death, and had been continuously prior thereto for a period of more than seventeen (17) years, a member of the Los Angeles Police Department, to-wit: a patrolman, and for more than three (3) years next immediately preceding his death, the said deceased, Arnold G. Dillon, had received, as such police officer, a salary of Two Hundred ($200.00) dollars per month, the same being his average monthly rate of salary during said last mentioned period.

"IV. That on or about the 15th of April, 1934, the said Arnold G. Dillon died as a result of injuries received during the performance of his duties as a police officer of the City of Los Angeles; that the immediate occasion of his death was a self-inflicted gun shot wound of the head, which said Arnold G. Dillon inflicted upon himself as a result of his unbalanced mental condition at the said time.

"V. That on or about the 25th of April, 1931, and during the course of his employment as such police officer, said Arnold G. Dillon suffered severe injuries to his body, nervous system and head, as a result of a collision between the automobile in which he was riding and an automobile being driven by a Mrs. Greenhaw; said accident occurred at or near the intersection of Soto and Houston Streets, City of Los Angeles, State of California.

"VI. That thereafter and on or about the 10th of June, 1932, and during the course of his employment as such police officer, the said Arnold G. Dillon suffered severe injuries to his body, nervous system and brain, as a result of being struck by a truck at the aforesaid time, while escorting children across the street at or near the intersection of Ann and North Main Streets, Los Angeles, California.

"VII. That your petitioner is informed and believes and upon such information and belief alleges that the injuries resulting from either or both of the above described accidents caused said Arnold G. Dillon to

become mentally unbalanced and while so mentally unbalanced, and as a direct and proximate result thereof, the said Arnold G. Dillon took his life as aforesaid; that the death of the said Arnold G. Dillon was directly and proximately caused by and resulted from said injuries so received by him during the performance of his duties as a police officer of the City of Los Angeles, State of California.

"VIII. That on or about the month of September, 1934, your petitioner filed with the respondent The Board of Pension Commissioners of the City of Los Angeles an application for a pension as provided in Article 17, Section 183 of the Charter of the City of Los Angeles, and demanded payment of same.

"IX. That your petitioner thereafter produced evidence in support of her application but that thereafter or on or about the 26th of February, 1935, the said Board of Pension Commissioners of the City of Los Angeles, arbitrarily and unreasonably denied the said application and refused to award and ever since have refused to award and has not paid petitioner herein the pension to which she is entitled by virtue of the Article 17, Section 183 of the Charter of the City of Los Angeles, State of California, or any pension whatsoever.

"X. That your petitioner is informed and believes and upon such information and belief alleges that there are sufficient monies on deposit in the city treasury of the City of Los Angeles, to the credit of the Fire and Police Fund to pay your petitioner any and all pensions to which she is entitled.

"XI. That it is the plain, ministerial and absolute duty of said Board of Pension Commissioners of the City of Los Angeles and of the respondents as members thereof, to make its and their order awarding your petitioner the pension to which she is entitled by virtue of Article 17, Section 183, of the Charter of the City of Los Angeles; that your petitioner has no plain, speedy and adequate remedy at law.

"Wherefore, petitioner prays judgment that a peremptory Writ of Mandate issue out of this Court commanding said Board of Pension Commissioners of the City of Los Angeles, and respondents, members thereof, to:

"1. Make its and their order awarding to petitioner herein the pension to which she is entitled by virtue of Article 17, Section 183, of the Charter of the City of Los Angeles; and that said pension be paid to her upon the first of each and every month during her lifetime and commencing upon the first day of the month immediately following the date of said order;

"2. Make its and their order that there be paid to your petitioner herein, in cash, a sum equal to the amount of pension funds due for the period of three (3) years immediately preceding the date of filing of the within petition; and a sum equal to the amount of pension which will accrue to and including the date of said order, together with interest thereon at the rate of Seven (7%) per cent per annum;

"3. For the costs of your petitioner incurred herein and for such other and further relief as to the Court may seem just and proper."

This is the sole question to be determined:

*Does the foregoing petition state a cause of action not barred by the statute of limitations (sec. 338, subd. 1, Code Civ.Proc.)?*

[1-3] This question must be answered in the negative and is governed by the following established principles of law:

(1) A claim for a pension is one upon a liability created by statute and, in the absence of an express charter provision fixing a time within which an action may be filed to enforce the right to a pension, is subject to the limitation of three years as provided in section 338, subdivision 1, of the Code of Civil Procedure. Hermanson v. Board of Pension Com'rs, 219 Cal. 622, 624, 28 P.2d 21; Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 580, 59 P.2d 104.

(2) The statute of limitations may be relied upon as a defense in a special proceeding for a writ of mandate. Hermanson v. Board of Pension Com'rs, supra, 219 Cal. at page 625, 28 P.2d 21.

(3) It is an essential element of a cause of action for a pension to allege and prove that a claim for the same has been presented and rejected in accordance with the requirements of section 376 of article XXVIII of the charter of the city of Los Angeles. No suit can be maintained on such a claim unless the same shall be presented to the city or the appropriate board of said city within six months after the last item sued upon has accrued. Dryden v. Board of Pension Com'rs, supra, 6 Cal.2d at page 580, 59 P.2d 104.

[4] From the facts alleged in the petition it appears that petitioner's husband died April 15, 1934, that in September of the same year petitioner filed her applica-

tion for a pension with respondent board, which application was denied on the 26th day of February, 1935. The present proceeding was commenced December 5, 1938, which was more than three years after the rejection of petitioner's claim. Hence, under the rules of law, (1) and (2), above stated, any cause of action which petitioner may have had based upon her application for a pension filed with respondent board in September of 1934 was barred by the statute of limitations on and after February 27, 1938, more than nine months before the present proceeding was filed.

Since there is no allegation in the petition that any subsequent claim or demand for a pension has been filed by petitioner with either of respondents, under rule of law (3) above stated, there is a total absence of the allegation of an essential fact to support a cause of action for a pension, and the trial court properly sustained the demurrer to the petition without leave to amend.

Because of the foregoing conclusions, it is unnecessary for us to consider the discussion in Talbot v. City of Pasadena, 28 Cal.App.2d 271, 82 P.2d 483, as to the nature of a claim for a pension, to-wit, whether or not the right to a pension is a continuing one.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.




38 Cal.App.2d 122

## KYNE v. KYNE.

Civ. 11246.

District Court of Appeal, First District, Division 1, California.

March 22, 1940.

**1. Bastards ⇐92**

Interlocutory judgment and various orders adjudging defendant to be the father of plaintiff, an illegitimate child, and ordering payments for support, medical expenses, attorney's fees and costs were not appealable and purported appeals therefrom would be dismissed, the only proper appeal being from "final judgment".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

**2. Infants ⇐1**

The word "interests" as used in statute providing that a child conceived but not yet born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth means anything that is profitable or beneficial to the child. Civ.Code, § 29.

See Words and Phrases, Permanent Edition, for all other definitions of "Interests".

**3. Bastards ⇐33**

Action under statute authorizing minor illegitimate child to enforce support from its father may be brought by unborn child through a guardian ad litem, in view of statute providing that an unborn child is to be deemed an existing person so far as necessary for its interests, and in view of statute making father criminally liable for failure to furnish necessary support to unborn child. Civ.Code, §§ 29, 196a; Pen.Code, § 270.

**4. Bastards ⇐69**

An action for support of an illegitimate child may be brought and the necessary fact of parentage determined therein without the child having first secured an adjudication of paternity in a separate proceeding under separate statute. Civ.Code, §§ 196a, 231.

**5. Bastards ⇐70**

In action for support of illegitimate child wherein defendant attempted to disprove paternity by evidence that mother had syphilis and that defendant did not, but defendant's medical witnesses were unable to testify that mother ever had syphilis, all evidence relating to syphilis was properly stricken by trial court as being insufficient for jury. Civ.Code, § 196a.

**6. Evidence ⇐222(1)**
**Witnesses ⇐379(8), 397**

Prior testimony of a witness if inconsistent with testimony given on a later trial is admissible only for impeachment purposes, but the prior inconsistent statements of a party may be deemed an admission against interest and may be considered not only as impeachment but also as evidence of the fact involved.

**7. Bastards ⇐33**

Under statute requiring father and mother to support illegitimate child and providing that a civil suit to enforce such obligation may be maintained in behalf of a minor illegitimate child by his mother or guardian, the child is the "real party in interest" in such a suit. Civ.Code, § 196a.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

**8. Witnesses ⇐379(8), 397**

In action by illegitimate child by his guardian ad litem for support from alleged father, statements made by mother at prior trials were admissible for impeachment purposes only and not as evidence, since mother was not a "party" to the action but only a "witness". Civ.Code, § 196a.

See Words and Phrases, Permanent Edition, for all other definitions of "Party" and "Witness".

**9. Bastards ⇐59**

As respects issue of paternity, evidence of illicit relation on part of mother of illegitimate child with men other than defendant alleged to be the father must be directed to a time at or about the time when in the ordinary course of nature the child must have been begotten.

**10. Bastards ⇐59**

In action for support of illegitimate child wherein defendant denied he was the father, evidence as to mother's alleged relationships with various men long before child was conceived was properly excluded on issue of previous unchastity as not having been directed to a time at or about time when child must have been begotten. Civ. Code, § 196a.

**11. Bastards ⇐94**

In action against alleged father for support of illegitimate child pursuant to statute, trial court could allow plaintiff attorneys' fees on theory such legal services were part of child's right to support, and they were properly allowed as part of the judgment after the services had been rendered. Civ.Code, § 196a.

**12. Bastards ⇐94**

In action for support of illegitimate child wherein proof of paternity was a jurisdictional prerequisite and plaintiff's attorneys participated in three jury trials, various motions and incidental proceedings, $3,500 for plaintiff's attorneys' fees was not excessive in view of defendant's ability to pay, as against contention that paternity was established as a separate matter under separate statute under which attorneys' fees could not be allowed. Civ.Code, §§ 196a, 231.

**13. Bastards ⇐78**

In action for support of illegitimate child born in February, 1936, wherein complaint was filed in November, 1935, and judgment rendered in December, 1937, defendant was properly required to make monthly support payments commencing as of the date of the child's birth, as against contention that judgment could not properly provide for any support prior to date of judgment. Civ.Code, § 196a.

**14. Bastards ⇐69, 70**

In action for support of illegitimate child, issue of paternity was legal issue for jury and amount of support was of equitable cognizance and to be fixed by a court under the statute, and procedure of court in submitting paternity issue to jury, entering interlocutory judgment thereon, and thereafter taking evidence on support issue, and making finding of fact in reference thereto without independent findings as to paternity, was proper. Civ.Code, § 196a.

**15. Appeal and error ⇐757(4)**

The underlying purpose of court rule providing that where instructions given to a jury are attacked as erroneous, all other instructions given bearing upon that subject must be printed in full in appellant's brief was well exemplified in case where, had all of the instructions on the point involved been printed in appellant's brief, it would have at once been apparent that no error was committed. Rules of Supreme Court and District Court of Appeal, rule 8, § 3.

**16. Bastards ⇐71**

In action for support of illegitimate child, where jury was clearly instructed that burden was on plaintiff and that verdict must be for defendant unless plaintiff proved his case by a preponderance of the evidence, instruction that only issue for jury was whether defendant was or was not the father of plaintiff and submission of only two forms of verdict was not error for failure to submit instruction and form of verdict to the effect that jury could find that they did not know whether defendant was the father. Civ.Code, § 196a.

**17. Bastards ⇐65**

**In support action by illegitimate child, evidence sustained judgment that defendant was the father and ordering defendant to pay support money, medical and hospital expenses, attorneys' fees, and costs. Civ. Code, § 196a.**

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Tom Kyne, Jr., a minor, by Ruth Filipello, his guardian ad litem, against Tom Kyne for support of plaintiff as an illegitimate child. Judgment for plaintiff and defendant appeals.

Affirmed.

Laurenz J. Krueger, of San Francisco, for appellant.

Allen Spivock, Philander B. Beadle, and Samuel Hauser, all of San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Defendant appeals from several designated judgments and orders of the trial court by which it was adjudged that defendant is the father of plaintiff, an illegitimate child; that he should pay $100 a month for the support of the child from the date of its birth, February 15, 1936, to January 15, 1938, and thereafter, during minority, or unless changed by order of the court, $60 per month; that he should also pay $150 for medical and hospital bills incurred at plaintiff's birth; $3,500 as and for attorneys' fees; and costs of $1,064.20. Neither the interlocutory judgment nor the various orders appealed from are appealable, and the purported appeals therefrom will be dismissed. The final judgment properly appealed from is dated December 16, 1937.

On this appeal the appellant does not challenge the sufficiency of the evidence to sustain the finding that he is the father of the plaintiff. For that reason the facts in reference to that issue need not be set forth in detail. It is sufficient to state that the evidence produced on behalf of respondent, although contradicted by appellant, was to the effect that appellant, a married man, during the months of March, April and May, 1935, had sexual intercourse, on various occasions, with Nola McMinn, then a minor, and that as a result of one of those acts of intercourse, the plaintiff was conceived. Shortly after becoming pregnant, Nola McMinn sued appellant for seduction. Appellant, by an agreement entered into with Nola McMinn, settled this action by the payment to her of $2,100. Thereafter in November, 1935 (before the birth of plaintiff, which occurred on February 15, 1936), this action was commenced by John Doe Kyne, an unborn minor, by Ruth Filipello, his guardian ad litem. Ruth Filipello, a married sister of Nola McMinn, had been appointed guardian ad litem on the petition of the expectant mother, herself a minor. Demurrers to the original and to the first amended complaint were sustained. Thereafter, a second amended complaint was filed after the birth of the plaintiff. This complaint was filed by the plaintiff, Tom Kyne, Jr., by Ruth Filipello, his guardian ad litem. It prays for a judgment adjudicating that defendant is the father of plaintiff; that defendant be ordered to pay $500 per month towards the support of plaintiff, and that plaintiff recover certain hospital and medical expenses, together with a reasonable attorneys' fees and costs of suit.

Three trials were had. The first resulted in a verdict for defendant. A new trial was granted. On the second trial the jury disagreed. On the present trial the jury, on the sole issue submitted to it, that of paternity, determined appellant to be the father of respondent, and the trial court, after taking further evidence on the issue of support, rendered its judgment as outlined above.

Appellant contends that the action was prematurely brought. In this regard it is urged that the present action is a hybrid action, first, to establish paternity under section 231 of the Civil Code, and, secondly, for support of an illegitimate under section 196a of the Civil Code; that neither type of action can be maintained by an unborn child; that if the action was unauthorized when commenced it could not later acquire validity, after the birth of the child, by the filing of an amended complaint.

Section 231 of the Civil Code provides: "An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption." It is appellant's contention that the use of the term "birth" indicates that a child must be born before an action may be brought under this section.

Section 196a of the Civil Code, as it read prior to its amendment in 1939, St.1939, p. 1758, provided: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

Appellant contends that this section, applying as it does to a "minor illegitimate child", must be read in connection with section 26 of the Civil Code, which provides that in calculating periods of minority as specified in section 25 of that code such periods "must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority". Appellant contends that, if the two sections be construed together, it necessarily follows that an unborn child may not maintain an action for support by a guardian ad litem prior to its birth.

[2, 3] In support of this conclusion appellant also points to the fact that in several instances where it is meant that the particular statute should apply to an unborn child, specific reference has been made to this fact in the statute. Sec. 270, Pen.Code; sec. 123, Probate Code. Appellant also makes reference to the common-law rule followed in some states, and which appellant claims has been adopted in this state, that a child after birth may not maintain an action for prenatal injuries. Since the filing of the briefs in this case, the Third Appellate District has decided Scott v. McPheeters, 33 Cal.App.2d 629, 92 P.2d 678, 93 P.2d 562, and the Supreme Court has denied a hearing therein. In that case an eleven-year-old child, through a guardian ad litem, brought an action for prenatal injuries. The trial court sustained a demurrer. The appellate court reversed the judgment on the ground that section 29 of the Civil Code has changed the common-law rule to the effect that prior to birth a child has no legal existence independent of its mother. Section 29 of the Civil Code reads as follows: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." This is the section which respondent relies upon as justifying the bringing of the present action prior to birth. In the Scott case the court held that section 29 is clear and unambiguous and comes into operation whenever it is in the interests of the child that it should come into operation. It was held that the word "interests", appearing in the section means "anything that is profitable or beneficial to the child". 33 Cal.App.2d at page 631, 92 P.2d 678, 93 P.2d 562. We think the reasoning of this case is sound. Its application to the present case is obvious. The present action is brought under section 196a for support. That section confers upon a minor illegitimate child the right to enforce support from its father. Obviously, a child must be supported both before, as well as after, birth. It is clearly to the best "interests" of the child that its father be compelled to support it, if the mother cannot, prior to its birth. Under such circumstances, section 29 must be read together with section 196a so as to confer the right on an unborn child through a guardian ad litem to compel the right to support conferred by the code.

This conclusion is fortified by the fact that under the provisions of section 270 of the Penal Code the father of an illegitimate is guilty of a misdemeanor if he wilfully fails "to furnish necessary food, clothing, shelter or medical attendance or other remedial care" to his minor child. That section, as amended in 1925, St.1925, p. 544, expressly provides that: "A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned." In People v. Yates, 114 Cal. App., Supp., 782, 298 P. 961, the appellate department of the superior court of Los Angeles held that a father failing to supply food and care to his unborn child was guilty of a misdemeanor, and that this was so even though such food and care obviously would have to be supplied to the child indirectly through its mother. It would be a strange doctrine to hold that a father was criminally liable for failure to support an unborn child, but that there was no civil action by means of which the unborn child, through its guardian, could enforce that responsibility. In the present case the support order requires support only from the date of birth. For reasons already indicated, the commencement of the action prior to birth is contemplated and permitted by section 196a of the Civil Code.

[4] Appellant contends the action is premature for another entirely different

reason. It is his theory that an action for support of an illegitimate may not be entertained until paternity is first established under section 231 of the Civil Code. In Myers v. Harrington, 70 Cal.App. 680, at page 684, 234 P. 412, at page 413, the court disposed of this exact contention in the following language: "In the enforcing of the obligation [i. e., support], it is, of course, necessary to establish the fact of parentage. The section fixing this obligation upon the father of an illegitimate child does not, in and of itself, presuppose that a judgment decreeing the fact of parentage must first be had and obtained before any suit may be maintained for maintenance or support. There appears to be no valid reason why the fact of parentage and the question of the necessity of support and, also, of the ability to support may not all be litigated and determined in one proceeding." Even if this portion of the opinion is dicta, as contended by appellant (the court denying the right of support under the facts there set forth), we think it sound. The present action is under section 196a to enforce support. In order to determine whether the plaintiff is entitled to support, the fact of parentage must also be determined. To compel the plaintiff to first proceed under section 231 of the Civil Code, and secure a final judgment thereunder, before starting his proceeding for support, would, in many cases, defeat the right of support given by section 196a.

In addition to the reasoning in the Myers case, supra, there are many cases where the courts on appeal, without specific discussion of the point now being considered, have affirmed judgments secured under section 196a where the issues of paternity and amount of support were determined without a prior adjudication of paternity. Mathews v. Hornbeck, 80 Cal.App. 704, 252 P. 667; Sweet v. Hamilothoris, 84 Cal.App. 775, 258 P. 652; Mensing v. Croter, 209 Cal. 318, 287 P. 336, 280 P. 1026; Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163. The case of Schallman v. Haas, 33 Cal.App. 28, 164 P. 336, relied upon by appellant, does not hold to the contrary. That case merely holds that after a judgment has been rendered establishing paternity, and providing for support, and where that judgment has been stayed pending appeal, the trial court is without jurisdiction to order the appealing defendant to forthwith pay to plaintiff any sums for support and attorneys' fees.

[5] Appellant's next contention is that the trial court committed error in striking from the record all evidence tending to show that Nola McMinn was afflicted with syphilis and that appellant was not. It was the theory of the appellant that if he could show that shortly after the conception of the plaintiff, Nola McMinn was afflicted with syphilis and he was not, that this would tend to show that he was not the father of the plaintiff, and that Nola McMinn had had intercourse with someone else from whom she contracted the disease. The trial court permitted appellant to introduce, out of order, considerable evidence that he did not and never had had syphilis. Upon the privilege of doctor and patient being waived, the court permitted the doctor who had attended Nola McMinn during her pregnancy, and at the birth of plaintiff, to testify that during the pregnancy, because of the appearance of a rash which "looked like a very light sunburn", he had given Nola McMinn four different blood tests to ascertain whether she had syphilis. Three of these tests were negative. One test—the so-called Craig test—resulted in a 1 plus positive reaction. All of the doctors were agreed that this was not satisfactory evidence of the presence of syphilis. Nevertheless, the attending physician gave his patient various salvarsan and bismuth injections, that being one of the treatments for syphilis. He testified that he did this purely as a precautionary measure to protect the unborn child; that the treatments were not "strictly necessary"; and that "at no time was I positive she had syphilis".

The trial court, after the introduction of this evidence, upon motion of respondent, struck all the evidence relating to syphilis from the record. This was clearly correct. Appellant failed to introduce any evidence from which an inference could properly be drawn that Nola McMinn ever had syphilis. If the attending physician, called as a witness by appellant, and if the other medical witnesses called by him, could not testify that the disease was present, certainly the jury should not have been permitted to speculate upon the question. Appellant simply failed to produce sufficient proof on this issue to go to the jury. The motion to strike was proper.

[6-8] Appellant also complains of the trial court's ruling that prior statements of Nola McMinn made on the two former trials were admissible only for impeach-

ment purposes and could not be considered as evidence on this trial. The law is settled that the prior testimony of a witness, if inconsistent with testimony given on a later trial, is admissible only for impeachment purposes, but the prior inconsistent statements of a party may be deemed an admission against interest, and may be considered, not only as impeachment but also as evidence of the fact involved. Gates v. Pendleton, 71 Cal.App. 752, 236 P. 365; Card v. Boms, 210 Cal. 200, 291 P. 190. It is appellant's theory that Nola McMinn is, in legal effect, a party to this action. This theory is unsound. Secton 196a requires the father and the mother to support their illegitimate children, and provides that: "A civil suit to enforce such obligations may be maintained *in behalf of a minor illegitimate child,* by his mother or guardian." (Italics ours.) Obviously, the infant is the real party in interest. Any support money awarded is for his benefit. Even where the mother appears as plaintiff she is not maintaining the action for herself but "in behalf of" the child. In the present case the mother does not appear even in a representative capacity, the action being maintained by a guardian ad litem on behalf of the child. No complaint is, or can be, made that the trial court did not permit full interrogation of Nola McMinn as to her prior testimony. The ruling of the trial court that such prior statements were only admissible for impeachment purposes was correct.

[9, 10] Appellant's next contention is that he was unduly circumscribed in his efforts to show previous unchastity on the part of Nola McMinn. The rule is well-settled that "evidence of illicit relation on the part of the mother of an illegitimate child with men other than the defendant, whom she alleges to be its father, must be directed to a time at or about the time when, in the ordinary course of nature, the child must have been begotten". Mensing v. Croter, 209 Cal. 318, 320, 287 P. 336, 337, 280 P. 1026, see, also, Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St.Rep. 131. On the present trial Nola McMinn testified that she did not keep company or go out with other men during the months of March, April, May and June, 1935—the only months that the child could have been conceived. It is true that on one of the prior trials she testified that she went out with several designated men during this period, although she denied any improper relations with them. On the present trial she explained this inconsistency. As already held, such evidence given on the preceding trials was not evidence as to the fact in the present trial, but was admissible solely for impeachment purposes. This being so, the various rulings of the trial court precluding appellant from interrogating Nola McMinn about her relationships with various men long before the child was conceived, fall squarely within the rule announced in Mensing v. Croter and Estate of Gird, supra. Appellant simply failed to produce the necessary foundation upon which the admission of such evidence could be predicated.

[11] Appellant next makes several contentions with regard to the provision in the judgment that defendant pay plaintiff the sum of $3,500 as and for attorneys' fees. It is first urged that attorneys' fees may not be allowed at all in an action brought under section 196a of the Civil Code. This point has recently been decided adversely to the contentions of appellant by the Supreme Court. In the case of Arais v. Kalensnikoff, 10 Cal.2d 428, at page 434, 74 P.2d 1043, at page 1047, 115 A.L.R. 163 the court stated: "Also, as section 196a of the Civil Code requires a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation. The amount which the defendant was ordered to pay is not excessive in view of the evidence concerning his financial ability and was properly allowed. Paxton v. Paxton, 150 Cal. 667, 89 P. 1083."

Appellant, while recognizing the holding in the Arais case, contends that it is not proper to make such allowance after the services have been performed. Certain cases involving the allowance of fees in divorce actions have been thus interpreted. See, 1 Cal.Jur. p. 998, sec. 51. This rule has no application here. In cases under section 196a of the Civil Code the allowance of attorney's fee is predicated upon the theory that such legal services are part of the child's right to support. In Schallman v. Haas, 33 Cal.App. 28, 164 P. 336, it was held that the court is without power to allow such fees *before* judgment. The Arais case determined that it was proper tc allow the attorney's fees as part of the judgment. Since they are allowed as part of the judgment it is obvious that they must be allowed after the services have been rendered.

[12] Appellant also challenges the award of attorneys' fees as excessive. This contention is predicated upon the theory that there were two separate actions before the trial court—one under section 231 of the Civil Code to establish paternity, and a separate action under section 196a for support, and that attorneys' fees may not be allowed under section 231. Based on this premise, it is urged that if all of the work done by the attorneys under section 231 be subtracted from the total work done by them, the award of $3,500 for services in reference to the support order is grossly excessive. As already pointed out in discussing the question as to whether this action was prematurely brought, this action was brought under section 196a to enforce the right to support. Attorneys' fees are admittedly allowable under that section. In establishing the rights conferred by that section, proof of paternity is a jurisdictional prerequisite. The evidence shows that the attorneys were required to participate in three jury trials. Various motions were argued and various incidental proceedings had. The amount that appellant was ordered to pay is not excessive in view of the evidence concerning his financial ability, and the evidence as to the services rendered.

[13] The appellant next contends that the judgment improperly provides for any support prior to the date of judgment. The judgment is dated December 16, 1937. It orders the defendant to make monthly payments commencing as of February 15, 1936, the date of the birth of respondent. The complaint was filed in November, 1935. In Mathews v. Hornbeck, 80 Cal.App. 704, 252 P. 667, the court squarely held, in an action brought under section 196a, that a judgment requiring the father to pay for his child's support from the date the complaint was filed was proper. The court, in that case, fully discusses the point under consideration and distinguishes the case of Demartini v. Marini, 45 Cal.App. 418, 187 P. 985, relied upon by appellant here. The point is without merit.

[14] Appellant next contends that the entire action is equitable; that the trial court submitted the issue of paternity to a jury and entered an interlocutory judgment based on its verdict; that thereafter the trial court took evidence on the issue involving the amount of support money to be awarded; that the trial court made findings of fact in reference thereto; that the finding therein as to paternity merely "parroted" the jury's finding; that separate and independent findings should have been made on the paternity issue. The procedure adopted by the trial court was clearly correct. The issue of paternity involved in the support action is a legal issue, and was properly decided by the jury. In Myers v. Harrington, 70 Cal.App. 680, 689, 234 P. 412, it was held that the issue of paternity is a legal issue. The procedure of the trial court in the instant case was apparently patterned on that adopted in Mensing v. Croter, 209 Cal. 318, 287 P. 336, 280 P. 1026. As to fixing the amount of support, section 196a provides that this shall be fixed by the "court". The issues involved therein are of equitable cognizance. This is conceded by appellant. The procedure adopted by the trial court was correct.

[15, 16] The last major contention of the appellant is that certain instructions were improperly given. Preliminarily it should be said that in presenting this point appellant has failed to comply with that portion of the rules of the Supreme Court and District Courts of Appeal (Rule VIII, sec. 3) which provides that "where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief". The underlying purpose of this rule is well-exemplified in the present case. Had all the instructions on the point involved been printed in the appellant's brief, it would have at once been apparent that no error was committed. The contention of appellant in this regard is that it was error to instruct the jury that the only issue submitted to them was whether the defendant is or is not the father of plaintiff. Complaint is also made that but two forms of verdict were submitted to the jury, one finding the defendant to be the father of the plaintiff, and the other finding he was not. It is contended that the jury should have been instructed, and should have been given a form of verdict, to the effect that they could find that they did not know whether defendant was the father. The jury was several times clearly and correctly instructed that the burden was on the plaintiff, and that unless he proved his case by a preponderance of the evidence their verdict must be for defendant. No contention is made that appellant offered any instruction on the point now under consideration. The point is without merit.

The other points raised by appellant need not be separately considered. They have all been considered and are found to be without merit.

[17] Although appellant does not challenge the sufficiency of the evidence to sustain the judgment, we have, nevertheless, read the entire transcript. It appears therefrom that the case was fairly tried, that no error was committed therein, and that the judgment is amply supported.

As already indicated, appellant has appealed from various orders and from the interlocutory judgment entered after the rendition of the jury's verdict. None of these are appealable. The appeals therefrom are dismissed. The final judgment properly appealed from is affirmed.

I concur: KNIGHT, J.

WARD, J., deeming himself disqualified, does not participate herein.




38 Cal.App.2d 180

**In re EATON'S ESTATE.**

**MAURER v. ARMOUR et al.**

**Civ. 12433-S.**

District Court of Appeal, Second District, Division 1, California.

March 27, 1940.

Hearing Denied May 23, 1940.

**1. Judgment ⇐564(1)**

A matter becomes "res judicata" only when the judgment or decree deciding it becomes final.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

**2. Judgment ⇐564(1)**

There can be but one "final" judgment or its equivalent in any proceeding, as respects effect of such judgment as "res judicata".

See Words and Phrases, Permanent Edition, for all other definitions of "Final".

**3. Judgment ⇐564(2)**

Intermediate orders are, as a matter of law, not "final" so as to become "res judicata", and cannot be given such effect by any voluntary or gratuitous order of the court, but the statutes alone govern.

**4. Guardian and ward ⇐163**

An order allowing payment of fees to guardian and attorneys for services, entered in connection with approval of guardian's current account, though on separate petition, was not "final", and hence was not "res judicata" so as to preclude urging objections to such fees in proceeding for settlement of final account. Probate Code, §§ 1200, 1516, 1556.

**5. Judgment ⇐564(1)**

The court has no inherent power to establish authority and conditions under which orders authorizing action and decree in connection therewith may be "final" so as to be "res judicata."

**6. Guardian and ward ⇐163**

A claim by guardian or by attorneys for fees for services may be presented as a simple item of current or intermediate account, and effect of allowance thereof is not changed by fact that such claims were presented by separate petition and settled by special order and decree when the current account was settled.

**7. Guardian and ward ⇐163**

The settlement of guardian's intermediate account is not conclusive, but is merely prima facie evidence of its correctness, subject to being inquired into. Probate Code, §§ 1516, 1556.

**8. Guardian and ward ⇐163**

The fact that notice of hearing on guardian's current account and allowance of fees to guardian and attorneys was sufficient did not affect right to challenge such account at final hearing. Probate Code, §§ 1200, 1516, 1556.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Proceeding in the matter of the estate of Marie S. Eaton, an incompetent person, wherein William P. Maurer, as executor of the estate of Marie S. Eaton, deceased, appealed from an order and judgment settling and allowing the final account of Ralph

S. Armour, as guardian, approving payment of fees to Charles J. Katz and another.

Reversed.

Raphael Dechter, and B. L. Hoyt, both of Los Angeles, for appellant.

Hansen & Sweeney, of Los Angeles, for respondent Ralph S. Armour.

Charles J. Katz and Alfred Gitelson, in pro. per. (Samuel W. Blum, of Los Angeles, of counsel, for respondents Charles J. Katz and Alfred Gitelson.

DORAN, Justice.

William P. Maurer, as executor of the Estate of Marie S. Eaton, an incompetent, appeals "from that certain order and judgment settling and allowing" the final account of the guardian, Ralph S. Armour, "and dismissing, overruling and denying the exceptions and objections of William P. Maurer, as Executor of the Estate of Marie S. Eaton, deceased, thereto, and from the whole thereof".

On May 9, 1936, Charles J. Katz and Alfred Gitelson, attorneys, on behalf of Frederick S. Schwinn, nephew of Marie S. Eaton, filed a petition in the superior court to have Marie S. Eaton declared an incompetent and for the appointment of Schwinn or the Union Bank and Trust Company of Los Angeles as the guardian of her person and estate. On or about August 10, 1936, after a contest wherein appellant William P. Maurer, in his individual capacity, sought to be appointed the guardian, the Security–First National Bank was appointed but declined to act; on August 31, 1936, the court appointed Ralph S. Armour as guardian of the person and estate of Marie S. Eaton, and he thereupon qualified and entered upon the performance of his duties.

On November 6, 1936, a current account of the guardian, and a petition for fee to the guardian, and also a petition for allowance of attorneys' fees to attorneys for the guardian were filed, and the same were set for hearing on November 27, 1936. It is urged by the respondent guardian that the provisions of section 1200 of the Probate Code were followed with regard to notice of said hearing.

On November 15, 1936, Marie S. Eaton died.

On November 17, 1936, Katz & Gitelson filed a petition for allowance of attorney's fees in the matter of the petition of Frederick S. Schwinn for the appointment of a guardian, and the same was also set for hearing on November 27, 1936. In like manner it is urged by respondents Katz & Gitelson that the provisions of section 1200 of the Probate Code were followed with regard to notice of the hearing of said matter, and that copies of the petition and notice of hearing were served upon the guardian.

On November 27, 1936, settlement of the current account and each of the aforesaid petitions came on for hearing, and the court, after receiving evidence in respect thereto made the three following separate orders: Settled the current account and allowed the guardian $3,500 for services rendered; authorized and directed the guardian to pay the sum of $3,500 to Hansen & Sweeney (attorneys for the guardian) for services rendered; authorized and directed the guardian to pay the sum of $1,500 to Katz & Gitelson for services rendered.

In each of said orders the court also found that due notice of the hearings had been given. No appeal was taken from the orders, or any of them.

Thereafter, and pursuant to the aforesaid orders, the guardian made the payments as provided therein. None of the payments so made appear in the so-called current account settled on November 27, 1936.

On January 18, 1937, appellant William P. Maurer was appointed executor of the estate of Marie S. Eaton.

On February 4, 1937, the guardian filed his final account setting forth therein and seeking credit for the payment of the fees as aforesaid. Appellant executor filed objections to the account, and at the same time filed a petition to set aside the orders made on November 27, 1936. A demurrer, motion to strike and a return were filed by Katz & Gitelson to said petition, and a return was also filed by the respondent guardian.

The matter of the petition of executor to set aside the orders of November 27, 1936, was heard and determined at the hearing on May 11, 1937. Katz & Gitelson, joined in by the guardian, objected to the hearing thereof on the ground that the orders in question were regular on their face and had become final. After argument, the court sustained objections to said petition and proceeded to hear the objections to the guardian's final account. This hearing involved the guardian's final account and appellant's objections thereto, which included

the objection to the three items relating to the payment of the fees by the guardian, as aforesaid. The formal order settling the final account was entered July 1, 1937, upon which order and the judgment following the same, the appeal herein is based.

In the lower court the executor, appellant herein, objected to the approval of the final account on the grounds that due notice had not been given, pursuant to section 1200 of the Probate Code, of the hearing on November 27, 1936, and that the fees allowed were excessive. The trial court held that the orders made on November 27, 1936, had become final; that such matter was res judicata and that the court was without authority to go into the matter again, whereupon objections to the introduction of any evidence in support of the executor's contentions were sustained. The same contentions are renewed by the executor on appeal.

[1-3] Applying the general rule, it is only when the judgment or decree becomes final that the matter is res judicata. There can be but one final judgment or its equivalent in any proceeding. Such intermediate orders, sought to be relied upon as final, are as a matter of law not final and cannot be given such effect by any voluntary or gratuitous order of the court. The statutes alone govern, and for obvious reasons, for any other procedure would result in as many methods as there are judges.

[4-6] There is no provision of the Probate Code which operates to establish as final an order approving the current or intermediate account of a guardian. When the required conditions are present, and by virtue of statutory authority, courts may be petitioned for orders authorizing certain action and the decree in connection therewith may be final, but the court has no inherent power to establish such authority and conditions. There is nothing in the law which requires that either the fixing of the guardianship fee or the payment thereof shall be by petition and special order or decree. Hence, such claim by the guardian may be presented as a simple item of current or intermediate account and approved or disallowed as such by the court in appropriate proceedings. And the same is true with regard to the claim of respondent Katz & Gitelson for attorneys' fees. Such a claim could properly have been presented through the guardian as an item of an intermediate account. The fact, therefore, that these claims were presented by a separate petition and settled by special order and decree on the same day and at the same time that the current account was settled does not alter their identity as simple items of account, subject to the rules for the settlement of such items, and subject, also, to objection, inquiry and approval at the hearing on the settlement of the final account. Therefore, unless the guardianship fee and the attorneys' fees amounted to anything more than items of account, no special court order, except as authorized by law, could give them a different effect. In the absence of statutory authority or necessity, the formal petitions for authority to pay the fees and as well the special orders authorizing the payments thereof were superfluous and created no barrier either by virtue of the doctrine of res judicata or otherwise, which would or could serve to prevent the inquiry sought to be pursued by appellant at the hearing on the final account.

[7] It is true that section 1516 of the Probate Code gives the court power, upon petition of the guardian, to instruct such guardian as to the disposition, management, care, et cetera, of the estate. No suggestion, however, appears in the above-mentioned provision that such instruction shall have the effect of a final order or decree, or that the guardian's fee can be paid only upon petition therefor by the guardian. Section 1556 of the Probate Code suggests the contrary, for there it is provided that: "Every guardian shall be allowed the amount of his reasonable expenses incurred in the execution of his trust, and shall have such compensation for his services as the court in which his accounts are settled deems just and reasonable." In other words, the guardianship fee can be set up and claimed as an item of account and paid as such without the formality of a petition and special order or decree. This being so, such an order or decree adds nothing to what otherwise would be the approval of an account in the orderly and ordinary administration of the ward's estate. Although the procedure followed by respondents may be convenient and without valid objection, nevertheless such an order is not final, and the doctrine of res judicata does not apply thereto. To hold otherwise would give to an order merely settling an intermediate account the quality of finality. "* * * the settlement of the guardian's 'intermediate account' is not conclusive; but that it is 'merely prima facie evidence of its correctness, subject to being inquired into'."

Guardianship of Di Carlo, 3 Cal.2d 225, 44 P.2d 562, 565, 99 A.L.R. 990; see also, Guardianship of Vucinich, 3 Cal.2d 235, 44 P.2d 567.

[8] Appellant was entitled to make the showing sought to be made at the hearing of the final account. The question as to the sufficiency of the notice is beside the issue. The fact, if it was a fact, that such notice was sufficient does not affect the right to challenge the account at the final hearing thereof.

For the foregoing reasons the order and judgment settling and allowing the final account of the guardian, Ralph S. Armour, and dismissing, overruling and denying the exceptions and objections thereto of William P. Maurer, the executor of the Estate of Marie S. Eaton, deceased, are and each of them is, reversed.

We concur: YORK, P. J.; WHITE, J.




38 Cal.App.2d 139

**SESMA et al. v. ELLIS et al.**

**Civ. 2523.**

District Court of Appeal, Fourth District, California.

March 23, 1940.

**1. Specific performance ⇐121(4)**

In suit for partition wherein codefendants filed cross-complaint for specific performance of alleged agreement by plaintiffs to convey plaintiffs' interest in property to codefendants, evidence sustained finding that there was no written agreement between plaintiffs and codefendants, and hence judgment refusing relief to codefendants on cross-complaint was proper, where an oral contract to convey property would have been unenforceable because of statute of frauds, and there was no mutuality of remedy with respect to alleged agreement. Code Civ. Proc. § 1973.

**2. Contracts ⇐32**

Where parties to alleged agreement had refused to enter into the agreement unless its terms were reduced to writing, written assent to its terms was essential to make an effective agreement.

**3. Specific performance ⇐6**

In absence of mutuality of remedy with respect to alleged contract to convey an interest in real and personal property, contract could not be specifically enforced.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Suit for partition of real and personal property by Frank F. Sesma and another against Willard D. Ellis and others, as trustees, and others, wherein defendants Daniel Christian Petersen and Irene Petersen filed a cross-complaint for specific performance of a contract. From a judgment for plaintiffs, defendants Daniel Christian Petersen and Irene Petersen appeal.

Judgment modified, and, as modified, affirmed.

Dailey S. Stafford, of Los Angeles (A. P. G. Steffes, of Las Vegas, Nev., of counsel), for appellants.

Dave F. Smith, Donald F. Smith and Russell Smith, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

The respondents, as joint tenants, owned an undivided half interest in a 39-acre orange grove and in certain personal property used in connection therewith. The appellant Irene Petersen owned the other half interest in said property and she and her husband, the other appellant, had resided on the real property for some years. The other defendants held encumbrances on the property or were made parties for other reasons, but their interests are not in dispute or involved here.

On October 30, 1936, the respondents brought this action seeking a partition of this real and personal property. After the service of summons and beginning on November 16, 1936, negotiations looking to a compromise and settlement of the controversy were carried on between certain of the parties and their attorneys, different ones participating in the negotiations at various times. A written option "to buy or sell" was prepared under date of December 30, 1936, which provided that the appellants should have the option during

a 60-day period to purchase the interest of the respondents in the property for $6,000 cash, provided releases were secured releasing the respondents from all liability in connection with three trust deeds on the real property and in connection with current bills or amounts due or to become due on the personal property. The proposed agreement included a provision that if the option was not exercised by the appellants within sixty days the respondents should have a like option for a similar period to purchase the interest of the appellants, and provided for an escrow to facilitate the handling of the transaction.

On March 16, 1937, the appellants filed an answer and cross-complaint. In the latter, it was alleged that on December 30, 1936, the parties entered into a written agreement for the purchase by the appellants of respondents' interest in this property on described terms which are similar to those of the above-mentioned prepared contract. It is then alleged that the appellants deposited in escrow $6,000 in cash and full releases of all of the encumbrances and liabilities referred to in the prepared contract; that on February 18, 1937, the respondents were notified that the appellants had fulfilled all of the terms of the contract; and that the respondents refused to carry out their part of the agreement and convey the property to the appellants. The prayer is for specific performance of the contract of December 30, 1936.

At the trial the prepared contract of December 30, 1936, was marked for identification but was not admitted in evidence. The testimony is that it was signed by the appellants and handed to the respondents early in January, 1937; that Mr. Sesma signed it and later tore off that part of the document containing his signature; that Mrs. Sesma never signed the instrument; and that the same was never returned or delivered to the appellants. While there is evidence that the appellants deposited $6,000 with the escrow agent there is no evidence that all of the releases referred to in the proposed agreement were secured or placed in escrow. On February 18, 1937, the escrow officer phoned to Mr. Sesma telling him that he had releases of liability in connection with two of the trust deeds on the property and asking him where he could locate the beneficiary under the third trust deed. Apparently this incident is the one referred to in the allegation of the cross-complaint that on that day the respondents were notified that the appellants had fulfilled their part of the proposed agreement. We can find no evidence showing that all of the releases called for by the proposed agreement were at any time secured or placed in escrow, or that the respondents were notified thereof. In fact, it is alleged in the cross-complaint that the appellants have exhausted their funds and credits and will be unable to satisfy the obligations set forth in the proposed contract unless the relief sought for is granted.

Among other things, the court found that no agreement, written or otherwise, was entered into between the parties; that there was no agreement between them for the purchase or sale of any interest in the property in question; that it is not true that the appellants had complied with the terms of the proposed agreement of December 30, 1936; that it is not true that the respondents had been notified at any time that the appellants had complied with the terms of said proposed contract; that it is not true that the releases referred to had been made available to the respondents; and that it is not true that the appellants were entitled to a transfer of the property. It was further found that there was no written agreement and no note or memorandum of an agreement signed by the parties to be charged; that neither respondents' attorneys nor any other person were authorized, actually or ostensibly, to enter into such an agreement on behalf of the respondents; that the contract alleged and relied upon would in any event be invalid under the statute of frauds; that while there had been negotiations between the attorneys for the parties looking to the sale of respondents' interest in the property to the appellants these negotiations never culminated in an agreement; and that one of the conditions and terms agreed upon during the negotiations was that any agreement reached must be reduced to writing. The court denied relief to the appellants under their cross-complaint and entered a decree of partition providing for a sale of the property and division of the proceeds, it having been stipulated that the property could not be equitably divided in kind. From the decree so entered, this appeal was taken.

The appellants contend that the court erred in excluding certain evidence con-

sisting mainly of evidence of conversations between the respondents and their attorneys, conversations between the respondent husband and wife, and certain offered evidence of performance of various terms of the alleged agreement. While the cross-complaint alleged a written agreement between the parties under date of December 30, 1936, and while the appellants seem to have mainly relied on that agreement throughout the trial and on this appeal, it seems to be also contended that in any event there was an oral agreement with the terms of which they had fully complied. Under the findings and the evidence, it is unnecessary to consider any claimed errors in the exclusion of evidence since these could not have affected the result.

[1, 2] The court's finding that there was no written agreement between the parties is fully sustained by the evidence. The contention that there was an oral agreement rests upon the evidence of negotiations between the parties and their attorneys, which were carried on in the hope of reaching an agreement. Most of these conversations took place in November and December of 1936, and most of the acts claimed to have been done in the way of part performance were performed before the contract is alleged to have been made. These conversations are exceedingly indefinite and there is nothing to show that the minds of the parties met on specific things at any particular time, even by way of oral agreement. The only thing that clearly appears in connection with the negotiations is that the respondents insisted that they would not enter into any agreement unless its terms were reduced to writing. Under such conditions written assent to its terms was essential to make an effective agreement. Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077; Spinney v. Downing, 108 Cal. 666, 41 P. 797; Van Hoosen v. Briscoe, 85 Cal.App. 746, 259 P. 1115. Moreover, any oral contract to convey this property would have been unenforceable because of the statute of frauds. Code Civ. Proc. sec. 1973. Some contention was made that the attorneys for the respondents were authorized by them to enter into an agreement to sell their interest in the property to the appellants. Not only was the making of such an agreement by the attorneys for the respondents not shown but there was no proof or offer of proof that these attorneys were authorized, in writing, to make such an agreement.

[3] A further consideration is that there was no mutuality of remedy with respect to the claimed contract, in the absence of which a contract may not be specifically enforced. The contract, as contended for, called for the doing of things by third parties which they could not be required to do, and it clearly appears that specific performance on the part of the appellants could not have been enforced by the respondents had such relief been sought. Under such circumstances, the court was justified in refusing the relief asked for by the appellants.

Our attention is called to nothing which would justify a reversal of the judgment. However, the respondents agree with the appellants' contention that the court erred in awarding attorney's fees to the respondents in the interlocutory decree, from which this appeal was taken, and consent that the judgment be modified by striking therefrom the portion awarding such fee.

The judgment is modified by striking therefrom the portion thereof which allows attorney's fees to the respondents and, as so modified, the judgment is affirmed. The respective parties to pay their own costs on appeal.

We concur: MARKS, J.; GRIFFIN, J.




38 Cal.App.2d 58

## LOS ANGELES COUNTY v. CRAIG et al.

Civ. 11331.

District Court of Appeal, First District, Division 2, California.

March 19, 1940.

As Amended April 12, 1940.

**1. Counties ⇐190(1)**

"Registered," as used in vessel taxation statute in force when the constitutional provision concerning exemption of vessels from taxation except for state purposes was adopted, was used in its ordinary and popular sense, and was meant to include all vessels "registered" at the customs house

under what was technically known as registry, enrollment, or license. Pol.Code, § 3644; Const. art. 13, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Registered".

**2. Counties ⇐190(1)**

"Registered", as used in constitutional provision concerning exemption of vessels from taxation except for state purposes is to be given its ordinary and popular meaning. Pol.Code, § 3644; Const. art. 13, § 4.

**3. Counties ⇐190(1)**

The purpose of the constitutional provision concerning exemption of vessels from taxation except for state purposes is to assist the shipping industry, and the provision is free from ambiguity. Const. art. 13, § 4.

**4. Constitutional law ⇐14**

If words of an enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, courts will look no further to ascertain meaning of enactment.

**5. Constitutional law ⇐14**

Where a word having a technical, as well as a popular meaning, is used in the Constitution, courts will accord to such word the popular meaning unless nature of subject indicates, or the context suggests, that it is used in a technical sense.

**6. Counties ⇐190(1)**

Where a vessel of more than 50 tons burden was "enrolled" at a port in the state, the vessel was "registered" at a port within meaning of constitutional provision concerning exemption of vessels from taxation except for state purposes, and hence vessel was entitled to exemption from county taxation where it was engaged in transportation of freight or passengers within meaning of Constitution. Pol.Code, § 3644; Const. art. 13, § 4.

**7. Counties ⇐190(1)**

Evidence that vessel was designed for transportation of freight and passengers and had been actively used for that purpose for many years and that vessel was laid up and remained out of active use only because of business conditions, and that the lay up was of temporary nature, justified finding that vessel was "engaged in the transportation of freight or passengers" within meaning of constitutional provision concerning exemption of vessels from taxation except for state purposes. Const. art. 13, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Engaged in the Transportation of Freight or Passengers".

**8. Counties ⇐190(1)**

Under constitutional provision concerning exemption of vessels from taxation except for state purposes, it was not intended that a vessel should be exempt from taxation only while being actively and continuously used for the transportation of freight or passengers. Const. art. 13, § 4.

**9. Counties ⇐190(1)**

The test of whether a vessel is "engaged in the transportation of freight or passengers" within meaning of constitutional provision concerning exemption of vessels from taxation except for state purposes depends upon whether vessel is regularly used for such purpose, and whether any enforced withdrawal from use is merely temporary in character, and if vessel is regularly so used and enforced withdrawal is merely temporary, the vessel is still "engaged in the transportation of freight or passengers" within meaning of constitutional provision. Const. art. 13, § 4.

---

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by the County of Los Angeles against John F. Craig and others to recover personal property taxes alleged to have become due during the years 1932–1933 upon a vessel. From a judgment for defendants, plaintiff appeals.

Affirmed.

Everett W. Mattoon, former Co. Counsel, J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, all of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

SPENCE, Justice.

Plaintiff sought by this action to recover personal property taxes alleged to have become due during the years 1932 and 1933 upon a vessel known as the "Mazatlan". By way of defense, it was alleged that said vessel was exempt as it was a vessel of more than fifty tons burden and was at all times registered at a port in this state and engaged in the transportation of freight

and passengers. The court found in accordance with defendants' allegations relating to the claim of exemption and entered its judgment in favor of defendants. Plaintiff appeals from said judgment.

Section 4 of article XIII of the Constitution provides, "All vessels of more than fifty (50) tons burden registered at any port in this State and engaged in the transportation of freight or passengers shall be exempt from taxation except for State purposes * * *."

It is conceded that the "Mazatlan" was a vessel of approximately eight hundred tons burden but plaintiff contends that the evidence was insufficient to support the findings that said vessel was "registered at a port in the state of California and engaged in the transportation of freight and passengers". There was no conflict in the evidence and the problem presented is whether the uncontroverted facts bring said vessel within the meaning of the provisions of the above-mentioned section of the Constitution.

[1] The first question relates to the meaning of the word "registered" as used in said constitutional section. In Webster's New International Dictionary, second edition, the verb "register" is defined as "To record formally and exactly; to enroll; to enter precisely in a list or the like." See, also, 53 C.J. 1067. It thus appears that the word "registered", when used in its ordinary and popular sense, includes within its meaning "enrolled". It further appears that the word "registered" was used in its ordinary and popular sense in our code sections in force at the time of the adoption of the above-mentioned constitutional section in the year 1914 and for many years prior thereto. Section 3644 of the Political Code then read, "All vessels, except ferryboats, which may be registered, of every class which are by law required to be registered, must be assessed, and the taxes thereon paid, only in the county, or city and county, where the same are registered, enrolled, or licensed." It seems plain from the reading of said code section that the word "registered", appearing twice in the first portion thereof, was there meant to include all vessels "registered" at the custom's house under what was technically known as registry, enrollment or license. This is made more obvious by a reading of sections 3645 and 3646 of the Political Code as said sections then read, the last-mentioned section relating to "All boats and small craft not required to be registered * * *." It further appears that the use of the word "registered", in its ordinary and popular sense, was carried into certain subsequent amendments of said section 3644 and into certain subsequent headnotes of said sections 3644, 3645 and 3646, the first two sections carrying the headnote "Assessment of registered vessels" and the last section carrying the headnote "Non-registered boats". (See Deering's Political Code, 1931 Edition).

[2] The meaning of the word "registered", as used in said constitutional section, is important here as it is undisputed that the "Mazatlan" was enrolled at a port in this state during the years 1932 and 1933, or as one witness expressed it, was "registered by enrollment". Plaintiff contends that the word "registered", as used in said constitutional section, should be given its technical meaning (see The Mohawk, 70 U.S. 566, 3 Wall. 566, 18 L.Ed. 67; Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392, 21 S.Ct. 827, 45 L.Ed. 1146), while defendants contend that it should be given its ordinary and popular meaning. We are in accord with the meaning contended for by defendants, which meaning was adopted by the trial court.

[3-5] The obvious purpose of said constitutional section was to assist the shipping industry in this state and the wording of the section seems quite plain and free from ambiguity. It is well settled that "if the words of an enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning" (23 Cal.Jur. 730, sec. 109) and that "Where a word, having a technical, as well as a popular meaning, is used in the Constitution, the courts will accord to it the popular meaning, unless the nature of the subject indicates or the context suggests, that it is used in a technical sense." (Treadwell's Constitution of California, Annotated, 6th ed., p. vii, and authorities cited.) We find nothing in said constitutional section to indicate that the word "registered" was used in any sense other than its ordinary and popular sense, and the fact that said word had been used in its ordinary and popular sense in our code sections, relating to the assessment and taxation of vessels, for many years prior to the adoption of said constitutional section would seem to lead inevitably to the conclusion that it was so used in said con-

stitutional section. The views which we have expressed find support in the contemporaneous construction of said constitutional section by the officers of the County of Los Angeles, the plaintiff herein. The record shows that vessels similarly "registered" by enrollment, such as the vessels plying to Santa Catalina island from the mainland, were treated by said county officers as "registered" and exempt from taxation under said constitutional section. We believe that these views find further support in Wheaton v. Weston & Co., D.C., 128 F. 151, one of the authorities cited by plaintiff. While that case recognized the technical distinction between registry, enrollment and license, it was held the phrase "registered tonnage", as used in the statute there under consideration, applied to all vessels, whether under registry, enrollment or license.

[6] We therefore conclude that the uncontradicted evidence showing that the Mazatlan was "enrolled" at a port in this state was sufficient to sustain the finding that said vessel was "registered" at a port in this state within the meaning of section 4 of article XIII of the Constitution.

[7] The second question raised on this appeal relates to the meaning of the phrase "engaged in the transportation of freight or passengers" as used in said constitutional section. It is contended that the "Mazatlan" was not so "engaged" and that the evidence was insufficient to support the trial court's finding to that effect as said vessel had been tied up at the Craig Ship Building and Dry Dock Company's plant at Long Beach for some time prior to 1932 and did not leave there until August, 1933. The evidence showed, however, that said vessel was designed for the transportation of freight and passengers; that it has been actively used for that purpose for many years and had never been used for any other purpose; that it was laid up and had remained out of such active use only because of business conditions and the inability of its owners to obtain cargo or charter parties; that such lay up, while of long duration, was of a temporary nature; that the engines were turned over regularly and the vessel was kept in condition for active use at all times; and that it was put back into active use in the transportaion of freight and passengers in August, 1933. In view of this evidence, we find no merit in plaintiff's contention.

[8] It will be noted that said constitutional section does not use the words "actively engaged in" or even the words "while engaged in" or "when engaged in". The words used are "engaged in". To hold that a vessel designed for the transportation of freight and passengers and used solely for that purpose is not "engaged in the transportation of freight or passengers" within the meaning of said section while temporarily laid up for repairs or because of business conditions would lead to absurd results and would go far toward defeating the purpose of the exemption. It would mean that such vessel would be exempt from taxation only while being actively and continuously used for such transportation and would not be exempt during any period of temporary, enforced idleness. This could not have been the intention of the framers of the section or the intention of the people in adopting the same.

[9] We believe that the true test of whether a vessel is "engaged in the transportation of freight or passengers" within the meaning of said section depends upon whether such vessel is regularly used for such purpose and whether any enforced withdrawal from such use is merely temporary in character. If the vessel is regularly so used and the enforced withdrawal is merely temporary in character, then we are of the view that it is still "engaged in the transportation of freight or passengers" within the meaning of said section. A somewhat similar question was before the court in Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 P. 277, L.R.A. 1916E, 916. That case involved an engine which was regularly used in interstate commerce but which was temporarily withdrawn for the purpose of making necessary repairs. It was held that the engine was engaged in interstate commerce during the time that it was temporarily withdrawn for the purpose of such repairs. The authorities are extensively reviewed in the opinion in that case and the court quoted with approval the following language on page 790 of 170 Cal., on page 280 of 151 P., L.R.A. 1916E, 916: "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not

the test whether the withdrawal is merely temporary in character?" Such test was applied in that case and we believe it should be applied under the circumstances before us.

We therefore conclude that the evidence was sufficient to sustain the finding that the Mazatlan was "engaged in the transportation of freight and passengers" and entitled to exemption from taxation by plaintiff under said constitutional section.

The conclusions which we have reached make it unnecessary to discuss defendants' further contentions relating to the statute of limitations.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.




## DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al. v. INYO CHEMICAL CO. et al. *

## YOUNG v. SAME (STATE, Intervener).

Civ. 6347.

District Court of Appeal, Third District, California.

March 27, 1940.

Hearing Granted May 25, 1940.

**1. Appeal and error ⇐917(1)**

On appeal from judgment entered after demurrer to complaint in intervention in interpleader proceeding had been sustained without leave to amend, the facts would be taken to be as alleged in the complaint in intervention.

**2. Garnishment ⇐39, 44**

Claims for damages in tort, being unliquidated, are not such "debts" or "credits" as are contemplated by attachment laws to be subject to garnishment process, but after such a claim has been reduced to a fixed sum by a final judgment it is subject to such process. Code Civ.Proc. §§ 542–545.

See Words and Phrases, Permanent Edition, for all other definitions of "Debts" and "Credits".

* For subsequent opinion, see 108 P.2d 410.

**3. Garnishment ⇐44**

Pending an appeal from a judgment rendered in a tort action, the debt represented by the judgment is not subject to garnishment or attachment, effect of appeal being to keep alive the case as one of tort as it existed before the judgment was rendered.

**4. Garnishment ⇐39, 40, 44**

Where city appealed from judgment against it in tort action brought by corporation and Supreme Court approved one item of damage awarded by trial court but reversed judgment for purpose of determining another item of damage, levy against city, by state which was corporation's judgment creditor, made after Supreme Court's reversal and before another judgment was entered by trial court, was ineffective, since at time of levy there was no "judgment" against city, corporation's claim against city was not a "liquidated claim" and there was no money "owing and unpaid" by city to corporation as required by statute under which the levy was made. Code Civ.Proc. § 710(a) (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment", "Liquidated Claim", and "Owing and Unpaid".

**5. Appeal and error ⇐1148, 1176(1)**

A distinction exists between a "reversal" of a judgment and an "affirmance with a modification," and the part of an order directing entry of a new judgment, relating solely to proceedings after reversal and return of case to trial court, would not change the reviewing court's reversal to a mere modification, notwithstanding that it might appear that the same result could have been reached by a modification as was reached by a reversal.

See Words and Phrases, Permanent Edition, for all other definitions of "Reversal" and "Affirmance with a Modification".

**6. Appeal and error ⇐1091(1)**

The decision of a reviewing court regarding form of its judgment or mandate and regarding future proceedings in trial court is a part of reviewing court's duty generally and under statute, and as such it is presumed to have received the same consideration as any other feature in the case. Code Civ.Proc. § 957.

**7. Appeal and error ⇐1180(1)**

A decree which is "reversed" is vacated, and the matter stands as though no decree

had ever been made; to "reverse" meaning to overthrow, set aside, make void, annul, repeal, or revoke, as to reverse a judgment, sentence or decree, or to change to the contrary or to a former condition.

See Words and Phrases, Permanent Edition, for all other definitions of "Reverse" and "Reversed".

**8. Municipal corporations ⇐1031**

Proceeding provided by statute authorizing levy upon city which is the debtor of the levying party's judgment debtor is a "garnishment proceeding." Code Civ.Proc. § 710.

See Words and Phrases, Permanent Edition, for all other definitions of "Garnishment Proceeding".

**9. Garnishment ⇐44**

Where Supreme Court, on city's appeal from judgment against it in tort action brought by corporation, approved one item of damage awarded by trial court but reversed judgment for purpose of determining another item of damage, mere fact that certain directions were given by Supreme Court for guidance of trial court in event of a retrial did not have effect of affirming judgment of trial court in part so as to authorize a levy by state, which was corporation's judgment creditor, against the city, after Supreme Court's reversal and before another judgment was entered by trial court. Code Civ.Proc. § 710(a) (2).

**10. Garnishment ⇐25, 105**

A party seeking by way of garnishment to levy upon property of another in hands of third party has no better right in making the levy than has the creditor himself, and takes under the garnishment proceedings only such property as is clearly existent at instant the garnishment is levied.

---

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Interpleader action by the Department of Water and Power of the City of Los Angeles and another against the Inyo Chemical Company and others, wherein E. R. Young filed a cross-complaint, and wherein the State of California intervened. From an adverse judgment, the State of California appeals.

Affirmed.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for appellant.

E. L. Searle, of Los Angeles, for respondent.

Catlin & Catlin, by William E. Woodroof, and O'Melveny, Tuller & Myers, by Jackson W. Chance, all of Los Angeles, amici curiae in support of respondent.

SCHOTTKY, Justice pro tem., delivered the opinion of the court.

[1] This is an appeal by the State of California from a judgment entered after the demurrer of the defendant and respondent to the complaint in intervention of said state had been sustained without leave to amend. For the purpose of this appeal, therefore, the facts must be taken to be as alleged in said complaint in intervention. In chronological order, the facts on which the alleged cause of action of the state is based are as follows:

For several years prior to, and during the month of November, 1926, the defendant, Inyo Chemical Company, a corporation, operated a manufacturing plant near the southerly end of Owens lake, in Inyo county, California, in which it produced calcined trona and a refined soda ash from lands leased from the State of California. The City of Los Angeles and Department of Water and Power of the City of Los Angeles maintained and operated the so-called Los Angeles aqueduct along a course which passed a short distance westerly of said plant. On or about November 27, 1926, a break occurred in said aqueduct near said plant and the waters from said aqueduct washed through and over a portion of said premises so leased by said Inyo Chemical Company, and damaged and destroyed large quantities of dry trona and of the trona deposit, and caused damage to certain roads, pipe lines and power lines of said company, and also subjected said company to additional costs of operation during the time certain repairs were made.

On or about November 25, 1927, said Inyo Chemical Company filed an action in the superior court of Fresno county against said City of Los Angeles and against the Board of Water & Power Commissioners of the City of Los Angeles, and said Department of Water and Power of the City of Los Angeles to recover for said damages sustained by reason of said break in said aqueduct, upon the ground that said defendants in said action were negligent in the maintenance, care and operation of said aqueduct.

Thereafter said action was tried and said court found that the defendants were negligent in the construction of said aqueduct and in the maintenance, care and operation thereof, and that by reason of the negligence and carelessness of the defendants, and their failure to exercise due or proper care in the construction, maintenance and operation of said aqueduct, plaintiff was damaged in the sum of $236,251.96, which the court found was directly and proximately caused by the negligence and carelessness of the defendants; and said court thereupon made its conclusions of law that the plaintiff was entitled to judgment against the defendants in the amount of $236,251.96, and such judgment was entered accordingly.

On or about April 21, 1932, judgment was duly given and made in favor of the intervener herein, State of California, and against the defendant, Inyo Chemical Company, in the amount of $17,722.15, plus $7 costs, in an action brought by the People of the State of California against said Inyo Chemical Company in the superior court of Inyo county.

On June 13, 1934, said District Court of Appeal of the Fourth Appeliate District affirmed the finding of the trial court that the damages sustained by the Inyo Chemical Company were caused by the negligence of defendants, but reversed the judgment of the trial court and remanded the cause for a new trial solely upon the issue of the amount of damages, with instructions to the trial court to render judgment in favor of the respondent for the amount of damages so found upon a determination of that issue. Thereafter, the Supreme Court granted a hearing therein and on February 29, 1936, rendered its decision (Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, 859), approving the findings and conclusions of the trial court that the damages sustained by the plaintiff were caused by the negligence of the defendants and that said defendants were liable therefor. In regard to the amount of said damages, the Supreme Court affirmed the determination of the trial court as to one of the items, viz., an item of $53,551.96 for damages to structures and for increased operating expenses pending repairs, except that, by the concession of the plaintiff and respondent therein, said item was reduced by the sum of $8,702.94, which had been duplicated in arriving at said figure of $53,551.96. Said item of damages was thereby fixed and approved by said Supreme Court in the amount of $44,849.02, for which amount the trial court was ordered to enter judgment. In regard to the remaining item for which said trial court had awarded damages, viz., for damage to the interest of the Inyo Chemical Company in the mineral deposits to which it was entitled under its aforesaid lease, the Supreme Court affirmed and approved the finding of the trial court that 90,000 tons of said mineral had been destroyed, and that the profit which ultimately would have been realized by the plaintiff from said minerals so destroyed was $182,700. The Supreme Court found and determined, however, that said total loss of profit in the amount of $182,700 would have been by reason of production over a period of thirty-six years, and said court therefore reversed the judgment of the trial court for the sole purpose of determining the "present value" of the sum found by the trial court as the profit which would have been realized from the sale of the destroyed trona, and directed said trial court to enter judgment upon such determination. The Supreme Court, in concluding its opinion, stated:

"The findings and conclusions of the court below on all issues, including all items of damage found, are approved in all respects except as follows: (1) The amount shall be reduced in the sum of $8,702.94, in accordance with the concession of plaintiff; and (2) the damage to plaintiff's leasehold shall be computed by determining the present value of the sum found by the court below as the profit which would have been realized from the sale of the destroyed trona, in accordance with the views hereinbefore expressed.

"The judgment is reversed for the sole purpose of determining this sum, and the trial court is directed to enter judgment for the plaintiff upon such determination, each party to pay its own costs on appeal."

On or about March 31, 1936, the State of California paid to the controller of said City of Los Angeles, the sum of one dollar, and filed with said controller an abstract of the aforesaid judgment in favor of the State of California and against the Inyo Chemical Company together with an affidavit under section 710 of the Code of Civil Procedure of the State of California, which affidavit stated that the whole of said judgment, together with interest thereon, was then owing and unpaid and claimed the benefits of said section 710. Copies of such

abstract and of the affidavit were attached to the complaint in intervention, it being further alleged that on March 31, 1936, the plaintiffs herein did not have any auditor, and the controller was the official whose duty corresponded to that of auditor.

On October 8, 1937, the parties to the action in the superior court of Fresno county stipulated that judgment might be entered in that action in favor of the plaintiff in the action and against the City of Los Angeles and the Department of Water and Power of the City of Los Angeles in the sum of $90,000 without costs to either party, and thereafter, on said day judgment was so rendered.

Immediately thereafter, on the same day, the Department of Water and Power of the city filed a complaint in interpleader in the superior court in Los Angeles county, by which it sought to have the court determine the rights of the respective claimants to said moneys owing to said Inyo Chemical Company. The state filed its complaint in intervention in said proceeding setting forth the foregoing facts, and further alleging that the city and the Department of Water and Power had not paid any of the moneys owing to said Inyo Chemical Company and praying that the court determine that the state, by its levy, had obtained a first and paramount lien thereon and right thereto and that the court order the controller of said city to pay same to the state, to the extent of the aforesaid levy by the state under section 710 of the Code of Civil Procedure. This appeal is from the judgment entered in favor of the defendant and against the State of California.

Appellant presents two issues to the court as being necessary to decide on this appeal: First, the question whether section 710 of the Code of Civil Procedure is applicable to cities operating under a freeholders' charter in so far as the moneys sought to be levied upon as "owing and unpaid" are owing on account of the exercise by said city of one of its municipal affairs; and, second, the question when for the purpose of a levy under said section 710, may it be said there are moneys "owing and unpaid" by the municipality?

We shall discuss the second point first, because if we should hold that there was no money "owing and unpaid" from the City of Los Angeles to the Inyo Chemical Company at the time of the filing of the transcript of judgment by appellant, it will be unnecessary to decide the first question.

The question there presented is whether or not, at the time appellant made its levy under section 710 of the Code of Civil Procedure, there was "money due and owing" to the Inyo Chemical Company within the meaning of said section. Appellant contends that there was, while respondent contends that the claim arising out of tort which was the subject of the action entitled "Inyo Chemical Company v. City of Los Angeles", supra, was at all times unliquidated and incapable of ascertainment as to amount, so long as that action remained pending. Appellant argues that because the Supreme Court in its opinion determined that one item of $44,849.02 was found to have been properly proven by plaintiff as one of the items of its damage, that the Supreme Court, thereby, finally and conclusively fixed and determined that sum of money to be owing and unpaid from the City of Los Angeles to Inyo Chemical Company within the meaning of section 710 of the Code of Civil Procedure.

Section 710 reads in part as follows:

"(a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and unpaid by * * * any * * * city or municipality * * *, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

* * *

"2. If such money * * * is owing and unpaid to such judgment debtor by any * * * city or municipality * * * shall file said abstract or transcript and affidavit with the auditor of such * * * city or municipality * * *. Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor."

It is conceded by appellant that unless there was a definite sum owing and unpaid

by the municipality to the judgment debtor, there can be nothing upon which levy can be made. It is respondent's contention that nothing short of a final judgment entered by the trial court following the appeal in the case of Inyo Chemical Company v. City of Los Angeles can finally and completely determine and liquidate the amount of money due and owing from the City of Los Angeles to Inyo Chemical Company, and that because such judgment had not been entered, and had not yet become final when the levy under section 710 of the Code of Civil Procedure was made by the State of California, there was no sum of money due and owing from the City of Los Angeles, and such levy was ineffectual for any purpose.

[2] As was said in the case of Arp v. Blake, 63 Cal.App. 362, 218 P. 773, 777: "It is well settled that claims for damages in tort, being unliquidated, are not such debts or credits as are contemplated by the attachment laws to be subject to garnishment process. But after the claim has been reduced to a fixed sum by a final judgment it is then subject to such process. Until then the claim maintains its character as an unliquidated claim. Shinn on Attachment and Garnishment, vol. 2, §§ 482, 483; Waples-Platter Grocer Co. v. Texas & Pac. Ry. Co., 95 Tex. 486, 68 S.W. 265, 59 L.R.A. 353, and cases cited in the note. See, also, Hassie v. G. I. W. U. Congregation, 35 Cal. 378; Redondo Beach Co. v. Brewer, 101 Cal. 322, 35 P. 896."

[3] The law also seems to be well settled in this state that pending an appeal from a judgment rendered in a tort action, the debt represented by the judgment is not subject to garnishment or attachment. Pacific Gas & Electric Co. v. Nakano, 12 Cal. 2d 711, 87 P.2d 700, 702, 121 A.L.R. 417; Arp v. Blake, supra. As was said in Pacific Gas & Electric Co. v. Nakano, supra: "The effect of the appeal '*operated to keep alive the case as one of tort as it existed before the judgment was rendered*'. Arp v. Blake, supra [63 Cal.App.] page 373, 218 P. page 778. Therefore, pending the appeal, the plaintiff in said action *had only a claim for damages for injuries* suffered by the acts of the defendant, *or a chose in action arising on tort.*" (Emphasis added.)

Appellant argues that by its decision in the case of Inyo Chemical Co. v. City of Los Angeles, the Supreme Court had determined finally that the city was liable to Inyo Chemical Co. on account of the damages involved in said action, and that it was settled by said decision that the amount of damage to the structures placed by the Inyo Chemical Co. upon the leased property in question, and for increased operating expenses pending repairs, for which the city was so held liable, was the sum of $44,849.02. Appellant argues further that at the time the levy was made by the state on March 31, 1936, there was a fixed liability in favor of the judgment debtor of the state and against the City of Los Angeles in the fixed amount of $44,849.02, plus an additional fixed liability, the amount of which had not been ascertained.

[4] As we view the matter, the decision of the Supreme Court vacated the judgment of the court below and after said decision and before the entry of another judgment in the trial court, there was no judgment in said action. Therefore, the action being based upon a tort, and there being no judgment at the time appellant filed its transcript with the auditor, we must conclude that there was no money due and owing from the City of Los Angeles to the Inyo Chemical Co.

It is true that the Supreme Court in reversing the judgment did approve one of the items of damages awarded by the judgment, namely, the item of damage to the structures, and did state that the judgment was reversed for the sole purpose of determining the damage to the leasehold. But the fact is that the Supreme Court did reverse the judgment, and after the judgment was reversed there was no judgment in existence. On page 542 of its decision in 5 Cal.2d, on page 858 of 55 P.2d, the Supreme Court said: "We are accordingly satisfied with the general conclusion of the court below, together with the above concession by plaintiff; but in one important respect the judgment is erroneous and it must be reversed."

[5-7] As was said in the case of Cowdery v. London & San Francisco Bank, 139 Cal. 298, 73 P. 196, 197, 96 Am.St.Rep. 115:

"To reverse is 'to overthrow; set aside; make void; annul; repeal; revoke: as, to reverse a judgment, sentence, or decree' (Cent.Dic.); or, 'to change to the contrary, or to a former condition' (Standard Dic.). To the same effect, see Laithe v. McDonald, 7 Kan. 254; Abb.Law Dic.; Anderson, Law Dic.; Black, Law Dic.; Bouv.Law Dic. The distinction between

a reversal of a judgment and an affirmance, with a modification, is too marked and radical to justify us in disregarding it. The decision of this court as to the form of its judgment or mandate, and as to what shall be the future proceedings in the court below, is a part of its duty generally, and particularly under section 957, Code Civ.Proc., and as such it is presumed to have received the same consideration as any other feature in the case. We are bound to assume that this court in this case acted advisedly and deliberately, and had good reason for ordering a reversal rather than a modification and affirmance. The part of the order directing the entry of a new judgment related solely to the proceedings after the reversal and the return of the case to the court below, and was not intended to, nor could it, change the reversal to a mere modification. Neither can the fact that it may now appear to us that the same result could have been reached by a modification justify this court in now changing the effect of the mandate.

"The effect of an order of reversal upon the judgment reversed is not left in doubt by the decisions in this state. In Reynolds v. Hosmer, 45 Cal. [616], 628, the court says: 'When the Supreme Court reversed the judgment of the circuit court, * * * and its mandate was filed in the lower court, * * * the judgment was reversed, whether the lower court afterwards made any order conforming its judgment to that of the Supreme Court or not.' In Estate of Mitchell, 126 Cal. [248], 250, 58 P. [549], 550, it is said: 'When the order * * * was reversed, it no longer had any vitality or force, and the result was to leave the proceeding where it stood before that order was made.' When a decree is reversed, it is vacated, and the matter stands 'as though no decree had ever been made.' Ashton v. Heydenfeldt, 124 Cal. 17, 56 P. 624. When a judgment is reversed, 'it is as if never rendered.' Raun v. Reynolds, 18 Cal. [275], 290. When the order of the Supreme Court in the case of London, etc., Bank v. Bandmann, 120 Cal. 220, 52 P. 583, 65 Am.St. Rep. 179, was made, reversing the judgment of the court below, that judgment was forthwith vacated, and until action was taken by the court below in pursuance of the mandate, to enter another judgment in accordance with the opinion of the Supreme Court, there was no judgment in existence in the case."

Appellant argues that the cases of Arp v. Blake, supra, and Pacific Gas & Electric Co. v. Nakano, supra, are not controlling in this case, because said cases relate to the general garnishment and attachment provision of sections 542–545 of the Code of Civil Procedure. Appellant states on page 19 of its opening brief:

"In the principal case, then, the only question is, whether the levy by the State herein, under the provisions of section 710 of the Code of Civil Procedure, 'caught' anything. We are not concerned with whether the levy, if it had been made under the general garnishment provisions of said sections 542–545, would have 'caught' anything.

"Said sections 542–545 refer to 'debts' and 'credits'. It has therefore been held that mere claims for damages in tort 'being unliquidated, are not such debts or credits as are contemplated by the attachment laws to be subject to garnishment process'. (Arp v. Blake, 63 Cal.App. 362, 372, 218 P. 773, 777.) But the section 710 provides a special form of garnishment for the benefit of any person who holds a judgment against a defendant 'to whom money is owing and unpaid' by the public bodies therein enumerated. (Irilarry v. City of San Diego, 186 Cal. 535, 199 P. 1041.) This provision, and none other, this court is here called upon to construe."

[8] We cannot agree with appellant's contention that there is any real distinction between the general garnishment and attachment provisions of the Code of Civil Procedure and section 710. There can be no question but that the procedure provided in section 710 is a true garnishment proceeding. It provides for a levy upon the city which is the debtor of the levying party's debtor. Such is the essence of a garnishment.

Appellant argues further on page 25 of its opening brief: "The material question is whether the existence and amount of the claimed liability have been liquidated. The manner in which the claim is liquidated is unimportant. It is probably true that liability under a tort claim usually is rendered certain, and the amount of the liability liquidated by way of a final judgment. It is not surprising, then, that we find language such as was used in Arp v. Blake, supra, in which the court very evidently was referring solely to said usual situation. Accurately speaking, it is the

fact of liquidation of the uncertain claim, and not the manner of liquidation, which is the material factor in determining whether the liability is subject to garnishment."

[9, 10] But, if, as we have already pointed out, a claim for damages in tort is unliquidated until reduced to final judgment, and there was at the time of the levy involved in this action, no final or any judgment, the judgment of the superior court having been reversed, we are unable to see how it can be reasonably contended that there was money "owing and unpaid" from the City of Los Angeles to Inyo Chemical Co. within the meaning of said section 710 of the Code of Civil Procedure. With no judgment in existence at the time of the levy, how could the city auditor of Los Angeles be authorized to "pay into the court which issued such abstract or transcript by his warrant or check payable to said court the * * * amount due on such claim * * * as will satisfy * * * said judgment and the balance thereof, if any, to the judgment debtor", as provided in said section 710? At the time of the levy the judgment had been reversed, and there was no judgment; and the mere fact that certain directions were given by the Supreme Court for the guidance of the trial court in the event of a retrial could not have the effect of affirming the judgment of the court below in part. Until a new judgment was entered it could not in our opinion be fairly held that the claim of the Inyo Chemical Co. against the City of Los Angeles was liquidated, or that there was money owing and unpaid by the City of Los Angeles to the Inyo Chemical Co. within the meaning of said section 710. Certainly the Inyo Chemical Co. could not have levied an execution after the decision of the Supreme Court, and it is the generally accepted rule that a party seeking by way of garnishment to levy upon property of another in the hands of a third party has no better right in making the levy than has the creditor himself, and that he takes under such garnishment proceedings only such property as is clearly existent at the instant the garnishment is levied.

We conclude that there was no money due and owing from the City of Los Angeles to the Inyo Chemical Co. at the time appellant filed its transcript with the auditor. Having reached such conclusion, it is unnecessary to decide the question of whether or not a judgment creditor seeking to avail himself of the provisions of section 710 of the Code of Civil Procedure is required to follow the provisions of the freeholder's charter of the City of Los Angeles in addition to the provisions of said section 710.

The judgment of the court below sustaining the demurrer to appellant's complaint in intervention without leave to amend is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




38 Cal.App.2d 135

## WASHINGTON BOULEVARD BEACH CO. v. CITY OF LOS ANGELES.

Civ. 11333.

District Court of Appeal, First District, Division 2, California.

March 22, 1940.

**1. Quieting title ⇐46**

An action to quiet title to portion of beach as not included in dedication of beach, streets, and alleys, as shown on subdivision map, did not involve two parcels of land, consisting of beach and such portion thereof, in absence of anything in title papers or on face of map showing segregation of beach into two parts.

**2. Quieting title ⇐46**

In action to quiet title to portion of beach as not included in dedication of beach, streets, and alleys, as shown on subdivision map, defendant city's rights are not measured solely by adverse possession, though it tendered such issue in its answer, where court made no finding thereon, but possession or nonpossession is mere circumstance in measuring scope of dedication.

**3. Dedication ⇐44**

In action to quiet title to portion of beach as not included in dedication of beach, streets, and alleys, as shown on subdivision map, by previous owner of subdivided lands, evidence *held* sufficient to show that such owner offered to dedicate such portion of beach as public park, and that offer was accepted by acts of public and successive municipalities of which subdivision became part.

**4. Dedication ⇐44**

**In action to quiet title to portion of beach, evidence *held* sufficient to sustain trial court's finding that defendant city acquired fee-simple title thereto by previous owner's dedication thereof for park purposes. Code Civ. Proc. § 1239.**

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action to quiet title by the Washington Boulevard Beach Company against the City of Los Angeles. Judgment for defendant, and plaintiff appeals.

Affirmed.

Bettin, Painter & Wait, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar and George William Adams, Deputy City Attys., all of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff has appealed from a judgment in favor of the defendant in an action to quiet title and has brought up a typewritten transcript.

Heretofore plaintiff's predecessors in interest were the owners of lands in Los Angeles county bordering on the Pacific Ocean. On September 26, 1902, Union Trust and Realty Company, a corporation, then being the owner, caused a part of those lands to be subdivided and mapped and later filed said map in the office of the county recorder of Los Angeles, in book No. 2 of maps, at pages 59 and 60. Commencing on the westerly side the tract was divided into blocks numbered 1 to 17. Blocks 1 to 7, inclusive, formed a row extending from north to south. The westerly property line of that row paralleled the line of the beach and was located approximately 200 feet east from the high tide line of the Pacific Ocean. The map had marked thereon the numbers and sizes of the lots and blocks and the names of the streets. In the space between the western property line of the blocks on the western side of the tract and between that line and the high tide line were marked the words "The Strand". On said map was endorsed: "Dedication. Union Trust and Realty Company, a corporation, hereby certifies that it is the proprietor of the property subdivided as shown on this map, and further that it caused said subdivision and map to be made, and dedicated for public use the streets, avenues, 'The Strand' and alleys as shown on this map. Union Trust Company, by etc." That endorsement was dated September 22, 1902. On the same date there was endorsed by the use of a red rubber stamp an acceptance of the offer of dedication. The record before us is so blurred that the exact language of the last-named endorsement cannot be read. However, these words are plain: "That all streets shown upon said map (surveyed September, 1902) and therein offered for dedication be and the same are hereby accepted as public streets." The acceptance did not contain a specific reference to "The Strand". Short Line Beach Subdivision No. 1 became a part of the city of Ocean Park and the name of the latter was changed to Venice. Later Venice was consolidated with the city of Los Angeles. In its complaint the plaintiff described by metes and bounds "The Strand" and claimed title thereto. In that connection it conceded that it made a dedication but claimed said dedication did not include "The Strand". Therefore, the sole question presented on this appeal is to determine the scope of the dedication heretofore made by the plaintiff's predecessors in interest.

[1, 2] The plaintiff contends that in this suit two parcels of land are involved. First, the beach extending from the building line down to the "high tide line", and second, "The Strand" which consists of a portion of the above-mentioned beach but which is a strip of land running parallel to the building line and which is approximately 55 feet wide. With that contention we do not agree. There is nothing in the title papers, nor is there anything on the face of the map, showing any segregation of "The Strand" into two parts. The plaintiff's contention rests wholly on its apparent claim that the rights of the defendant are measured solely by adverse possession. While it is true the defendant tendered the issue of adverse possession by certain defenses set up in its answer, the court made no finding thereon. Possession or nonpossession is a mere circumstance in measuring the scope of the dedication made by the predecessors of the plaintiff.

[3] In the next place the plaintiff contends that the evidence fails to show an implied dedication of the property here in question. F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62. The

vice in that contention is that the defendant is claiming an express offer of dedication and an acceptance thereof. In that connection it showed the written offer of dedication by the plaintiff's predecessor which was endorsed on the above-mentioned map. As to an acceptance, among other things, it showed the following: From the date of the recordation of the map the public has continuously used "The Strand" as a public park; from the date last mentioned Short Line Beach Subdivision No. 1, and the successive municipalities of which it became a part, have spent in excess of $300,000 for the improvement and maintenance of "The Strand"; and that said public bodies have from time to time since 1902 passed ordinances and adopted resolutions based on the theory that "The Strand" was a public park. After the above-mentioned map was prepared the plaintiff's predecessor in interest caused the same to be printed on circulars featuring large dwellings fronting on an open beach, an esplanade running north and south, the public engaged in promenading, resting on the sandy beach, or engaged in fishing. The esplanade as exhibited on the circulars shows a line of electroliers adjacent to the esplanade. Another illustrates many individuals engaged in bathing or fishing on the beach. Said circulars were broadcast to the general public and the officials of Venice. The lots fronting the beach were sold at high prices and Venice, at an early date, expended $100,000 in improvements of "The Strand". In 1912 Venice caused to be printed and circulated a map of the city. That map shows the property in dispute to be a "City Park". After that map was issued the city of Los Angeles spent large sums in the further improvement of the lots in dispute. During all these times the plaintiff stood by, accepted the benefits, but raised no question regarding the rights being asserted by the general public. The foregoing facts constituted an abundance of evidence to the effect that plaintiff's predecessor offered to dedicate "The Strand" as a public park and that said offer was accepted. Phillips v. Laguna Beach Co., 190 Cal. 180, 211 P. 225.

[4] The defendant makes the further point that the dedication of "The Strand" to public use resulted in the acquisition by the city of a fee simple to the property in suit. It contends that the public acquires the same rights in property by dedication as by condemnation (Lewis on Eminent Domain, vol. 2, sec. 472; Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080), and that in California the public acquires a fee simple in property condemned for park purposes. Code Civ.Proc., sec. 1239. The finding of the trial court that the city of Los Angeles is the owner in fee simple of the real property, the title to which is in dispute, was clearly sustained by the evidence.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




38 Cal.App.2d 118

**DUNNELL v. SHELLEY et al.**

**Civ. 11330.**

District Court of Appeal, First District, Division 2, California.

March 22, 1940.

**1. Trade-marks and trade-names and unfair competition** ⇐68(2)

Unfair practice acts may be adopted under police power. St.1935, pp. 1547, 1549, §§ 1, 7.

**2. Trade-marks and trade-names and unfair competition** ⇐68(2)

The Unfair Practices Act is not a price-fixing law, but merely regulates conduct of those engaged in business so as to eliminate such unfair practices as price discrimination for purpose of injuring competitors or tending to destroy competition. St.1935, pp. 1547, 1549, §§ 1, 7.

**3. Trade-marks and trade-names and unfair competition** ⇐68(2)

The means of regulation set out in Unfair Practices Act are neither arbitrary, unreasonable, nor capricious, but have reasonable relation to proper legislative purpose and do not deprive anyone of his just or constitutional rights. St.1935, pp. 1547, 1549, §§ 1, 7; Const.Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 8, cl. 3; § 10; Amend. 14, § 1.

**4. Trade-marks and trade-names and unfair competition ⇐68(2)**

The Unfair Practices Act is not unconstitutional as not establishing clear standard of conduct, since it prohibits and penalizes certain clearly defined methods. St.1935, pp. 1547, 1549, §§ 1, 7.

---

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Warren Dunnell, doing business under the fictitious firm name and style of the Sani-Gard Cover Company, against James H. Shelley and others, to enjoin commission of acts of unfair competition. From a judgment for defendants on the pleadings, plaintiff appeals.

Reversed.

Combs, Fritz & Murphine, of Los Angeles, for appellant.

Nichols, Cooper & Hickson, of Pomona, for respondents.

STURTEVANT, Justice.

The plaintiff commenced an action to obtain an injunction against the defendants to prevent them from committing acts of unfair competition. The defendants answered and thereafter they made a motion that judgment on the pleadings be entered in their favor. The motion was granted and from said judgment the plaintiff appeals.

The plaintiff's complaint is quite long. It purports to plead the facts stating a cause of action within the purview of sections 1 and 7 of chapter 477, pages 1547, 1549, of the Statutes of 1935, hereinafter called the Unfair Practices Act. The defendants do not contend that that statute was not properly pleaded, however, they do contend the statute is invalid and that its provisions violate section 10 of article I, section 1 of amendment XIV, and clause 3, section 8 of article I of the federal Constitution, and also section 16 of article I and section 13 of article I of the Constitution of the state of California.

Sections 1 and 7 of said statute are respectively as follows: "Section 1. It shall be unlawful for any person, firm, or corporation, doing business in the State of California and engaged in the production, manufacture, distribution or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this act. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act. * * * Sec. 7. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this act."

[1] The plaintiff in anticipation of the attacks by the defendants asserts that the statute above mentioned was enacted in the proper exercise of the police power. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479. The defendants

challenge that statement and cite Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664. Not questioning the authority of that case in the least, it is perfectly clear from a reading of it that it contains nothing that aids the defendants. There have been numerous unfair practice acts adopted in this country. So far as we can find the authorities all agree that such statutes may be adopted under the police power. Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164; Wholesale T. Dealers v. National, etc., Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486.

[2] In his next point the plaintiff contends that the Unfair Practices Act is not a price-fixing law, but only seeks to so regulate the conduct of those engaged in business, as to eliminate such unfair practices as price discrimination by any manner or means when such discrimination is done for the purpose of injuring competitors or tending to destroy competition and thus create a monopoly. He cites and relies on State of South Dakota v. Central Lumber Co., 24 S.D. 136, 123 N.W. 504, 42 L.R.A.,N.S., 804, and the opinion, in the same case, entitled Central Lumber Co. v. South Dakota, supra, rendered by the Supreme Court of the United States after it had granted a writ of error. Many other authorities to the same effect could have been cited. In the case entitled State v. Langley, 53 Wyo. 332, 84 P.2d 767, 775, which was decided by the supreme court of Wyoming on December 5, 1938, a most exhaustive study of the subject was made by that court. After such investigation and consideration that court stated its conclusions which fully sustain the contention of this plaintiff. The defendants cite no authorities to the contrary. They assume the Unfair Practices Act is a price-fixing law. However, the authorities just cited show they are in error in making that assumption.

[3] The next point made by the plaintiff is that the means of regulation as set out in the act are neither arbitrary, unreasonable, nor capricious, but have a reasonable relation to a proper legislative purpose, and such regulations do not deprive anyone of his just or constitutional rights. That statement does not present an open question. The contentions of the plaintiff are clearly sustained by the full and complete analysis by the court in Wholesale T. Dealers v. National, etc., Co., supra, and cases there cited. The defendants cite and rely on Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163. That case involved a statute that was quite different from the statute before us and the case contains nothing in conflict with what we have said.

[4] The defendants make the further attack that the Unfair Practices Act is unconstitutional in that it does not establish a clear standard of conduct by which the defendants may govern their acts. In this connection they cite cases which involved statutes of regulation. As shown hereinabove, the Unfair Practices Act prohibits and penalizes certain methods. The prohibited methods are clearly defined. There was no occasion for the setting up of "standards". In other words the defendants may transact their business in any manner they please, except that they are prohibited from doing certain specified things.

We find no merit in any of the claims that the statute violates either the state or federal Constitution. It follows that the trial court erred in granting the motion of the defendants for judgment on the pleadings.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.




38 Cal.App.2d 90

**LEE v. NANNY et al.**

**Civ. 12409.**

District Court of Appeal, Second District, Division 2, California.

March 21, 1940.

**Rehearing Denied April 15, 1940.**

**Hearing Denied May 20, 1940.**

**1. Master and servant ⇐318(1)**

Whether one performing services for another is independent contractor depends on amount of control which such other has right to exercise.

**2. Master and servant ⇐318(1)**

An "independent contractor" engages to do work according to his own methods, without being subject to his employer's control, except as to result of work.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

**3. Master and servant ⇐318(1)**

To change independent contractor's status to that of employee, employer must have full and unqualified right to control and direct details of work or means by which it is to be accomplished.

**4. Appeal and error ⇐1010(1)**

Whether commission salesman is independent contractor is ordinarily mixed question of law and fact for trial court, whose determination thereof is binding on reviewing court, if supported by substantial evidence.

**5. Master and servant ⇐332(3)**

Whether commission salesman is agent for independent contractor is law question for trial court, if only one reasonable inference can be drawn from evidence.

**6. Automobiles ⇐244(29)**

In action for injuries to one struck by automobile, driven by defendant alleged to have been codefendant's agent, evidence *held* sufficient to support trial court's implied finding that codefendant did not have right to exercise complete control over defendant driver in performance of his work of selling alcoholic beverages for codefendant on commission, so that driver was "independent contractor."

**7. Appeal and error ⇐1047(3)**

The trial court did not err to plaintiff's prejudice in striking out defendant's affidavit, filed by plaintiff in support of motion for new trial, where no reason appeared why facts stated therein were not brought out on defendant's cross-examination as witness at trial and there was no showing of diligence by plaintiff to discover such new evidence, her lack of knowledge of all evidence at time of trial, or probability that new evidence would have brought about different judgment if it had been received at trial.

**8. Appeal and error ⇐1013**

In personal injury suit, it is duty of trial court, sitting without jury, to determine extent of injuries suffered by plaintiff as result of accident involved.

**9. Damages ⇐134(1)**

A judgment awarding $2,000 damages for injuries to girl, who testified that she paid $575 to her physician and earned $25 per week before accident, but was unable to earn anything since accident, was not inadequate, where she testified that she worked as motion picture extra three weeks after accident and had been employed off and on since then and evidence as to cause of her ailments at time of trial was conflicting.

---

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Alice Lee against J. V. Nanny, doing business under the firm name of J. V. Nanny Bros. Company, and Joseph Pernetti to recover damages for personal injuries. From a judgment for plaintiff against defendant Pernetti in an unsatisfactory amount and a judgment for defendant Nanny, plaintiff appeals.

Affirmed.

Clarence Hansen, of Los Angeles, for appellant.

Charles E. R. Fulcher and Reginald I. Bauder, both of Los Angeles, for respondent Nanny.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries suffered when she was struck by an automobile driven by defendant Pernetti. She alleged that Pernetti was at the time of the accident the agent of defendant Nanny and as such agent was operating the car in the course of his employment. The trial court rendered judgment in favor of plaintiff against defendant Pernetti in the sum of $2,000 but found that Pernetti was an independent contractor and rendered judgment in favor of defendant Nanny. Plaintiff appeals from the judgment absolving defendant Nanny from liability and also from the judgment against Pernetti, claiming that the amount of the judgment is inadequate. There is also a purported appeal from the order denying a motion for a new trial.

Plaintiff's appeal from the judgment in favor of Nanny depends upon the question whether there is substantial evidence to support the finding that Pernetti was an independent contractor at the date of the accident. Pernetti had been in the employ of Nanny for several months before the accident, which occurred on February 7, 1937. Nanny was in the business of selling alcoholic beverages at wholesale and Pernetti was one of a number of his salesmen working on a commission basis. Pernetti owned and drove his own car but was allowed eighteen gallons of gasoline each week in lieu of the upkeep of the car. Under their working agreement Pernetti was to call up-

on prospective customers for the purpose of selling Nanny's goods and to make collections for the goods which he sold. His commissions were paid only out of the collections made. Pernetti was assigned to a certain district. Nanny testified: "We made out these districts in our office. We did not assign salesmen to them exclusively. They could work anywhere they wanted to. * * * He had no regular hours, no regular days * * * he could work any time he wanted to * * * that was understood." Although Pernetti was assigned to the district in the neighborhood of his residence he was at liberty to solicit business in any other territory if he wished to. In soliciting business Pernetti was not bound by instructions but could use his own methods. He used his car for other purposes than in the sale of Nanny's goods. He was at liberty to employ another person to operate his car if he cared to. Pernetti did not deliver the merchandise for which he took orders, but he was furnished with printed order blanks and receipt books bearing Nanny's name and address. Checks collected by Pernetti from the customers were made payable to Nanny. Nanny had the right to discharge Pernetti at any time. At the time of the accident, which occurred at about midnight, Pernetti was on his way to the Cliff Dwellers cafe to solicit business.

[1-3] The question whether Pernetti was an independent contractor depends upon the amount of control which Nanny had the right to exercise. An independent contractor engages to do work according to his own methods and without being subject to the control of his employer except as to the result of the work. Chapman v. Edwards, 133 Cal.App. 72, 24 P.2d 211. It is settled that the control to be exercised by the employer in order to change the status from that of independent contractor is complete control, "the full and unqualified right to control and direct the details of or the means by which the work is to be accomplished." Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 717, 189 P. 1025, 1029.

In arguing in support of the finding of the trial court that Pernetti was an independent contractor defendant Nanny relies upon Barton v. Studebaker Corp., supra. In that case one Owen injured the plaintiff while he was driving his own automobile which he used in his occupation of selling automobiles for the defendant Studebaker Corporation on a commission basis. Owen had the right to use the salesroom of his employer to show cars and also had the right to use a desk in the salesroom. He carried a business card on which his own name appeared as a representative of the corporation. Owen sold cars to prospects obtained at the salesroom, but no one controlled him as to when or where he should go or come. He made no report to the corporation as to what he did during any particular day. Sales had to meet with the approval of the manager, and the final arrangements for the sales were made in the corporation's offices. Occasionally Owen acted on the floor of the salesroom, answering the telephone and doing everything that was to be done, but there was no obligation on his part to be on the floor. The trial court rendered judgment against the Studebaker Corporation but the reviewing court reversed this judgment, holding that the test was whether the corporation had the authoritative control of Owen with respect to the manner in which the details of the work were to be performed. Owen was held to be an independent contractor.

Defendant Nanny also relies upon Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 5 P.2d 694, 695. In that case the defendant Beran injured the plaintiff while driving his own car which he used in selling goods for the defendant Lufstufka. Beran was a traveling salesman who worked on a commission basis and sold by sample. Lufstufka furnished him with samples, order blanks and a price list but he was not subject to the direction or the control of Lufstufka as to his time, his territory or the use of his car. The trial court granted a nonsuit as to the employer and this ruling was affirmed on appeal. It was held that the employer may exercise over the employee a certain measure of control without incurring the responsibilities which follow the relationship of master and servant. The court applied the rule that the test of control means complete control, which must be distinguished from "mere suggestion as to detail". It was further held that the fact that Beran's services were terminable at the will of either the firm or Beran did not alter the relationship.

[4, 5] The question whether a commission salesman is an independent contractor ordinarily is for the determination of the trial court. In most cases it is a mixed question of law and fact and the trial court's determination thereon is binding up-

on the reviewing court if it is supported by substantial evidence. If from the evidence presented only one reasonable inference can be drawn the question whether the salesman is an agent or an independent contractor becomes one of law for the court. Chapman v. Edwards, supra; Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473; May v. Farrell, 94 Cal.App. 703, 271 P. 789; Martinelli v. Stabnau, 11 Cal. App.2d 38, 52 P.2d 956.

[6] If in the present case the evidence be viewed in the light most favorable to plaintiff the most that can be said is that a debatable question was presented to the trial court and that a reasonable inference could be drawn in her favor. On the other hand, as contended by defendant Nanny, there are a number of circumstances from which a reasonable inference could be drawn that Pernetti was an independent contractor. Pernetti was not assigned exclusively to any specific territory; he could work at any time of the day or night according to his own choosing; he could report on any occasion on which he saw fit; he could solicit business by any means he chose; he could employ someone to operate his car for him if he cared to; Nanny was interested in the results produced and not in the means by which they were produced; suggestions were made by Nanny but no orders or instructions were given to Pernetti. From all of these circumstances it is apparent that there is ample support for the implied finding of the trial court that Nanny did not have the right to exercise complete control over Pernetti.

Plaintiff relies upon Phillips v. Larrabee, 32 Cal.App.2d 720, 90 P.2d 820, but the circumstances of the employment in that case were so dissimilar to those of the present case that the decision is of little aid to her. Another case relied upon by plaintiff is Hiner v. Olson, 23 Cal.App.2d 227, 72 P.2d 890, 73 P.2d 945. In that case the trial court found that the driver of the car was an agent operating the car in the course of his employment and the reviewing court ruled that there was sufficient evidence to support the finding. A very different situation is presented by the instant case, for the finding now under consideration is that Pernetti was an independent contractor.

[7] Plaintiff's contention that the trial court erred to her prejudice in striking out the affidavit of defendant Joseph Pernetti, which she filed in the hope of obtaining a new trial, is without merit. In the affidavit Pernetti set forth certain details of his working arrangement with Nanny which had not been brought out at the trial. Pernetti had been called as a witness at the trial and no reason appears why these facts were not brought out on cross-examination. No showing whatever was made of diligence on the part of plaintiff to discover the new evidence; nor is there a showing that plaintiff did not know of all of the evidence at the time of the trial. Moreover, it does not appear probable that the new evidence, if it had been received at the trial, would have brought about a different judgment.

[8, 9] In appealing from the judgment against defendant Pernetti, plaintiff bases her claim that the judgment for $2,000 is inadequate upon her testimony that she had been obligated to pay the sum of $575 to her physicians and that she had been earning before the accident the sum of $25 per week, whereas since the accident she had not been able to earn any sum whatever. Plaintiff relies upon the finding of the trial court that before the accident she was "employed at a salary of approximately $25 a week as a movie extra actress, and that since said accident and injuries so received she has been unable to work at her said employment". The finding that plaintiff has been unable to work since the accident is not supported by the evidence. Plaintiff testified that three weeks after the accident she worked as a motion picture extra—"took a position being a spectator in a court room". To the question "Have you been employed regularly since that time, or off and on?" She replied, "Off and on". Moreover there is a conflict in the evidence as to the cause of the ailments with which plaintiff was afflicted at the time of the trial. A physician who examined the plaintiff on behalf of the defense testified: "The pelvic condition is due to an infection which is of long standing, and could be neither caused nor influenced by any accident of this kind". It was the duty of the trial court to determine the extent of the injuries which plaintiff suffered as a result of the accident. We see no occasion for disturbing the conclusion of the trial court.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

We concur: MOORE, P. J.; McCOMB, J.

## WARD v. CITY OF MONROVIA et al.*

Civ. 6385.

District Court of Appeal, Third District, California.

March 23, 1940.

Hearing Granted May 22, 1940.

1. Waters and water courses ⇐152(8)

In action to establish water rights, evidence sustained court's finding that defendant city had a prescriptive right to all waters of a certain stream except five-elevenths of an undivided one-fifth thereof.

2. Waters and water courses ⇐127

A continuous adverse diversion and beneficial use of a given quantity of water for a single period of five years establishes title to that quantity.

3. Trial ⇐395(2)

In action involving water rights, where court finds that respondents are entitled to all the water of a stream or all the waters up to the capacity of certain diversion works, the findings are sufficiently definite.

4. Waters and water courses ⇐152(8)

In action involving water right, evidence was insufficient to establish respondents' title to waters which escaped over or flowed past diversion points.

5. Waters and water courses ⇐130

A riparian owner could acquire no rights in such voluntary releases as municipality might make for purpose of properly maintaining and repairing water system or in such waters as were released down the stream at times when they were unfit for municipal use.

6. Waters and water courses ⇐152(8)

In action involving water rights, evidence was sufficient to support implied finding that defendant city at no time ceased to make beneficial use of its water rights and had not lost right by failure to make beneficial use thereof for three years. Gen.Laws 1937, Act 9091, § 20a.

7. Waters and water courses ⇐156(9)

Where city renewed main water pipe line on plaintiff's property for a distance of 50 feet, installed new pipe about five feet from old pipe line, and substituted iron pipe for concrete pipe on branch line, such acts constituted a "material alteration of the easement", and any easement which city might have previously acquired was thereby extinguished.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Alteration of the Easement".

8. Easements ⇐44(2)

The character and extent of a way claimed by prescription are fixed and determined by the user under which it is gained, and owner of prescription has no right to make changes without consent of owner of servient estate.

9. Easements ⇐41

Prescriptive rights are "stricti juris" and should not be extended beyond the actual user.

See Words and Phrases, Permanent Edition, for all other definitions of "Stricti Juris."

10. Easements ⇐36(3)

Evidence sustained finding that city had acquired rights of way trails over plaintiff's land by adverse user for more than five years in the construction, maintenance, and repair of water system across plaintiff's land.

11. Eminent domain ⇐280

Where easement of city for right of way for water pipe line over plaintiff's property had been extinguished by change in location, but plaintiff had permitted city to make expenditures involved in reconstruction and relocation of pipe lines, plaintiff waived all other remedies which he might have invoked except that of an action for compensation.

12. Waters and water courses ⇐152(8)

In action involving water rights, evidence sustained judgment regarding right of city to use waters and in respect to the amount of water actually diverted and put to municipal and public use.

13. Adverse possession ⇐25

A person claiming title by adverse possession need not be in personal occupation of the land, but possession by an agent or tenant under him inures to his benefit and satisfies the requirements of statute of limitations.

14. Waters and water courses ⇐152(8)

In action involving water rights, where it appeared that under contract city acted as agent of others in the matter of appropriation, collection, diversion, and delivery of waters to point where they were divided, and that the others had diverted and put

* For subsequent opinion, see 108 P.2d 425.

their share of waters to a beneficial use for over 40 years prior to commencement of action, and that such diversion and use had continued without interruption ever since, evidence sustained finding that the others had acquired prescriptive right to water.

**15. Waters and water courses ⇐129**

The general rule that parties taking water out of a stream at a point below land of riparian owner cannot, as against his riparian rights, obtain prescriptive right was inapplicable, where water was actually abstracted from stream at point above plaintiff's land, conveyed across plaintiff's land, and used below plaintiff's land.

**16. Waters and water courses ⇐130**

Where during annual rainy season there was considerable flow of water through plaintiff's land which water was left after city had abstracted its entitlement under its prescriptive water right, plaintiff's riparian rights attached to such waters.

**17. Waters and water courses ⇐152(8)**

In action involving water rights, evidence was insufficient to sustain finding that only 10 acres of land of plaintiff riparian owner were suitable for cultivation.

**18. Waters and water courses ⇐152(10)**

In action involving water rights, the trial court must find expressly the quantity of water reasonably required by riparian owner. Const. art. 14, § 3.

---

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Consolidated actions by Harrison R. Ward against the City of Monrovia and others to establish water rights to enjoin defendants from interfering therewith and to quiet title to real estate. From an adverse judgment, plaintiff appeals.

Judgment in each action reversed, with directions.

Laurence B. Martin, of Los Angeles, for appellant.

Paul F. Garber, of Monrovia, W. H. Anderson and A. G. Ritter, both of Los Angeles, and Walter F. Dunn, of Monrovia, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

The above-entitled actions were consolidated for trial and are also consolidated upon this appeal. The parties in each are identical. The judgment in each case was that plaintiff take nothing, and certain rights in the real property involved were granted to defendants, City of Monrovia, and Bradbury Estate Company, and L. L. Bradbury Company. The appeal is taken by plaintiff from the judgment in each case.

The complaint in action No. 364,950 alleges that plaintiff is the owner of the northeast quarter of section 13, township 1 north, range 11 west, S. B. M., and that he has a riparian right to water flowing through said land, to the extent of ten miner's inches. He alleges that within five years last past defendant, City of Monrovia, diverted the said water at a point above his land, and took all of the said waters away in a pipe line, so that none of the stream flowed through his land; that ten inches of water is necessary for the development and use of said real property, and that the other defendants named claim an interest in the waters of said stream. Plaintiff prays that he be adjudged owner of the right to use ten miner's inches of the waters of said stream; that defendants be enjoined from interfering with the waters of said stream, to the extent that he will be deprived of ten inches of water; that his title to said real property be quieted; and that he have general relief.

The answer of the city sets up the defense of a prescriptive right to all of the waters of said stream, and also alleges that all of said waters have been dedicated by it to a public use. It alleges that it is the owner of an easement and right of way for a pipe line, together with necessary trails and roads for the repair and maintenance of said pipe line. Numerous other defenses are set up, but it is not necessary to detail them. Defendant prays that it be adjudged to be the owner of all of the waters of said stream, and of the easement for the pipe line.

The answers of defendants L. L. Bradbury Company and Bradbury Estate Company, sets up that they are the owners of 10/11 of 1/5 of the waters mentioned by plaintiff. They also allege that the action is barred by the provisions of sections 318, 319 of the Code of Civil Procedure.

In the second action, No. 365,253, plaintiff seeks to quiet title to one-quarter of the waters of Maple canyon, and for an injunction to restrain the diversion of more than that amount of water. The defenses are practically the same as those set up in the first action.

The City of Monrovia has a population in excess of ten thousand. It owns lands above the property of plaintiff, consisting of over thirteen hundred acres in the drainage area here involved.

The Bradburys (defendants) own some six hundred sixty-six acres of land some two miles away from the point of diversion at the pipe line of the city. Their lands are not riparian to the stream flowing through plaintiff's land, or any tributary thereof.

Appellant's land consists of about one hundred sixty acres, and is contiguous and riparian to what is known as "Sawpit Stream". The waters of Sawpit stream rise in, and have their source, in various watersheds in the San Gabriel mountains, being fed by springs and rainfall in the mountains. All of the waters herein involved flow in well-defined channels. The streams in Sycamore, Twin Springs and Vassar canyons all flow in a generally southwesterly direction to, and conjoin with Sawpit canyon. The same thereafter extend across appellant's land, and at the point shown on the map, unite with the Maple canyon stream, which flows almost directly south of the junction. The combined waters of said canyons, as the same flow into Sawpit stream, Sawpit canyon, are generally known as the "Sawpit Stream or Wash". Action No. 364,950 involved all these waters. In action No. 365,253, appellant sought to quiet his title to a one-quarter interest in the waters developed and flowing on the southeast quarter of section 12. These waters, of course, flow down Maple canyon, and as indicated, conjoin with Sawpit stream. The waters of Maple canyon, that is to say the waters involved in action No. 365,253, will be hereinafter sometimes referred to as the "Maple Stream". The waters involved in action No. 364,950, being the combined flow of all of Sawpit stream as the same extends over appellant's lands, and its tributaries shown above appellant's land on the map, sometimes referred to as the "East Fork Sawpit Stream". The East Fork Sawpit stream flows in a well-defined channel down and through appellant's land, and thereafter down to a flood-control reservoir and dam located partially on the westerly boundary of appellant's land, and then in a southerly direction to the San Gabriel river. The flood-control dam and reservoir were completed by the county of Los Angeles in July, 1926, and have been in operation since that date.

The flow of water in the stream which traverses plaintiff's land is intermittent in character. This is clearly indicated by the records of Los Angeles Flood Control District, admitted in evidence, and covering a period commencing March, 1928, and ending September 30, 1935. The measurement is taken at a point on plaintiff's land where the stream in controversy enters the reservoir of said district. For instance, in 1928, there was only a trace of inflow, too small to measure, during the months of May and June, while there was no inflow whatever in the months of July, August and September. The other years are very much the same. During the other months the flow is at times higher, depending upon the amount of precipitation. The city contends that it has diverted all the waters of the drainage area, above the lands of plaintiff, for over forty years prior to the commencement of the action.

During the nineties the city developed the waters here involved by means of a system of catchbasins, tunnels, intakes, and pipe lines installed in the first instance in the mountains above appellant's land on land owned by the city. The waters were collected near the various springs shown on the map, by means of small catchbasins, tunnels, and other intake works, and a system of pipe lines. The pipe line extending northeasterly across appellant's land and along the East Fork Sawpit stream, is over three thousand feet in length, and the pipe line extending down through Maple canyon runs over appellant's land for about one thousand feet to its point of junction with the East Fork Sawpit stream pipe line. These pipe lines extend practically adjacent to the various canyons and streams involved, and conjoin at a point near the westerly boundary of appellant's land as shown on the map. The water thus collected was and is then conveyed through a single pipe line extending in a general southwesterly direction through the flood-control dam, and finally southerly to a point known as the "5-Point Weir Box" (hereinafter sometimes referred to as the "5 Point Weir"). At the 5 point weir, a division of the water collected in the pipe line is made between the city and Bradbury interests, the latter receiving 10/11 of 1/5 of the waters, and the city receiving the balance. All abstractions, diversions and other development of the water herein involved were and are made by the city alone, above the 5 point weir and above the land owned by appellant.

The water distributed by the city at the 5 point weir is, of course, conducted by it to various reservoirs owned by the city below the 5 point weir, where the water is stored for subsequent use in the incorporated area of the city. The water distributed at the 5 point weir to the Bradbury interests was and is conveyed by pipe line to the lands of the Bradbury interests. The city, of course, claims a beneficial and necessary use of balance of the waters. The exact quantity of water, in terms of water measurement, appropriated by the city at this point, or at any other point was never established or determined by the lower court. The quantity of water distributed to the Bradbury interests below the 5 point weir was likewise never determined or established by the lower court, except that the court found that the city was entitled to all of the water included in said system, "after deducting 10/11 of 1/5 thereof" which was found to be the property of defendants Bradburys.

As we have seen, the city has no storage facilities whatever above the lands of plaintiff. All water is picked up in small "catch basins" at the head of each pipe line, and diverted directly without storage.

The complaint in the first action was filed November 1, 1933, and in the second action on November 8, 1933. Plaintiff acquired title to his real property in 1917.

It would extend this opinion to an unreasonable length if we were to discuss at length all of the points relied upon by appellant. Those omitted here may be considered either as having no merit whatever, or as necessarily decided in connection with the disposition of other related questions. We might point out, however, that the rights of defendants in the real property of plaintiff, if they exist at all, must, under the record here, be founded upon prescription alone. Respondents' brief gives no summary of the facts, neither does it set forth defendants' own position on any of the questions raised by appellant. Respondents devote their entire time to answering appellant, and in casting personal aspersions at his counsel on appeal. This may all be very interesting to the parties involved, but this court finds such personalities to be of little assistance in solving the questions presented.

[1-3] It is first contended that the court erred in finding that the city had a prescriptive right to all of the waters of Sawpit stream, except 5/11 of an undivided 1/5 thereof. We are of the opinion that there is ample evidence to support such findings. The evidence is overwhelming to the effect that the city has used all the waters of said drainage area, adversely, for fifty years, or thereabouts. Such waters, during said time, have been abstracted and diverted by means of pipe lines, and thereafter devoted to a public use. It might be added that the expression "all the waters", as used in this opinion, means the balance of the water remaining after the delivery of 5/11 of 1/5 thereof to defendants, Bradbury. The rule is that: "A continuous adverse diversion and beneficial use of a given quantity [of water] for a single period of five years establishes the title to that quantity. * * *" E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430–439, 163 P. 492, 496. Appellants strongly urge that the findings are too indefinite, and that the trial court should have found, in terms of miner's inches or cubic feet per second or other accepted and recognized terms, the exact amount of water to which respondents have acquired title by adverse user. It must be conceded that the method suggested is far more satisfactory. Where, however, the court finds that respondents are entitled to all of the water of the stream, or all the waters up to the capacity of certain diversion works, it would appear to be definite enough for all purposes.

[4, 5] It is quite clear that by the use of the expression "all the water" (of Sawpit stream), the court did not intend to include "excess waters", but only such water as can be collected by the several catch basins and intake works at the head of each pipe line. As to such waters as escape over or flow past such diversion points, the respondents have established no title whatever. The findings should be modified to establish this situation with accuracy and precision. Giving full effect to the rights accorded respondents, they would have no right to any waters flowing at any time in the stream through the land of plaintiff. Plaintiff, however, could acquire no rights in such voluntary releases as respondents might make for the purpose of properly maintaining and repairing their water system, or in such waters as are released down the stream at times when they are unfit for municipal use.

[6] Appellant contends that, although the city may have acquired title to the water by adverse possession, such title was lost by failure to make a beneficial use thereof for a period of three years. (Citing, Gen.Laws, Act 9091, sec. 20a.) There is sufficient evidence in the record to sup-

port an implied finding that the city at no time ceased to make a beneficial use of all of such waters. One of the witnesses, Packer, testified that, for a number of years—from 1927 to 1933—the intakes of the city "took 100% of the water available in the mountains". Another witness, Hannah, testified that he visited all the intakes from 1908 to 1924, about once a month, for the purpose of cleaning them. He never saw any water escaping.

It is contended that the city never used all of said waters because their pipe line and other parts of the system were in such a state of disrepair that considerable loss through leakage resulted. The evidence on this point is in slight conflict, but the witnesses mentioned above, and others, testified that constant repairs were made, and that any leakage was in such a small amount as to be negligible. There is sufficient evidence to support an implied finding that there was no loss or abandonment of any of the water.

[7, 8] It is contended that the finding that defendant city has an easement by prescription for a right of way for a pipe line over the property of plaintiff, is not supported by the evidence, and that whatever prescription title the city may have had was wiped out by a substantial and material alteration of the easement in 1930. During that year, according to the undisputed evidence, the water system involved here was overhauled by the city at considerable expense. On the land of plaintiff, the main pipe line was renewed for a distance of some fifty feet. New pipe was used, and it was laid about five feet from the old pipe line. The branch pipe line from Maple canyon joins the main pipe line on plaintiff's property. This branch line was renewed with the substitution of an iron pipe for concrete pipe, which was laid by the side of the old pipe. We are of the opinion that such acts constituted a material alteration of the easement which the evidence shows the city had acquired prior to 1930, and that any easement which the city may have previously acquired was thereby destroyed and extinguished. The general rule governing this question is stated as follows in North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69, 70: "The character and extent of a way claimed by prescription are fixed and determined by the user under which it is gained. Washb. Easem. p. 135. It was held in Capers v. McKee, 1 Strob. 164, that the owner by prescription of a private way over another's land has no right to cut ditches for the improvement of his way without the consent of the owner of the soil, unless he has acquired such right, also, by prescriptive use. And, where a grant is presumed from the use, then the use must define the extent of what is presumed to have been granted. Jones, Easem. §§ 818, 819."

[9] In that case it was held that one having a prescriptive right to maintain a flume has no right to substitute a ditch for the flume, and that such act would amount to a change in the nature of the easement. It has been held that a substantial change, shifting of the course of a road, will destroy an easement which previously existed. Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675. "Prescriptive rights are stricti juris and should not be extended beyond the actual user". Scott v. Fruit Growers Supply Co., 202 Cal. 47, 258 P. 1095, 1097. The case of Vestal v. Young, 147 Cal. 715, 82 P. 381, is also in point. It clearly appears that the law does not contemplate the acquisition by prescription of a way over another's land which shifts from one place to another. The previous location of the right of way for the pipe line had been as definitely and finally fixed by user as it would have been had the metes and bounds been set forth in a deed. Any material shifting or deviation of such pipe line would be in the nature of a trespass. Here, the new pipe line was laid at least five feet from the old one. "It was upon the property of appellant, over which respondents had no right whatever, and the principle is the same as if the new line had been hundreds of feet away." Felsenthal v. Warring, 40 Cal.App. 119, 180 P. 67, 70. The same rule holds in respect to the change of the method of conveying water. The substitution of a pipe line for an open ditch is such a change in the manner of the enjoyment of the easement as to terminate all rights which had previously been acquired in respect to an easement for the ditch. Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 P. 215, 15 L.R.A. 93.

[10] The trial court found that the city had acquired rights of way for trails over the land. The location of such trails is set forth in the pleadings and findings by a description based upon a survey. It is contended by appellant that the finding of adverse user in respect to such trails is not supported by the evidence. We find the contention to be without merit. Such trails, it can be reasonably inferred from

the evidence, were used adversely by the city for more than five years in the construction, maintenance and repair of the water system in question. It is also contended that the width of such right of way is excessive, and not supported by any evidence. This question was one which the trial court, after hearing the evidence and viewing the premises, should properly determine, and we believe the evidence sufficient.

[11, 12] Although, as we have indicated, the evidence will not support a finding that defendant city had a right of way for the pipe line over the land of plaintiff, this will not affect the judgment. The facts are undisputed on the question, and the court found that the city had appropriated and was using the right of way (as altered in 1930), and that it was using the pipe lines which were altered in character in 1930. In other words, a public use had intervened. The facts bring the case clearly within the rule laid down in Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185. By his inaction, plaintiff permitted the city to make the expenditures involved in the reconstruction and re-location of the pipe lines in 1930, and he is deemed to have waived all other remedies which he may have invoked, save that of an action for compensation. It is urged by plaintiff that he should have been allowed damages. It appears, however, that no cause of action for damages was alleged, or even attempted to be stated, nor was any proof of damage made at the trial. A separate action for damages might be proper, but certainly no such issues were presented here. The judgment, as applied to the right of the city to use the waters, and in respect to the amount of water actually diverted and put to a municipal or public use, is also supported by the findings under the same rule which we have applied to the right of way for the pipe line—a public use has intervened. The same rule is also applicable to the right of ways actually used by the city.

[13, 14] Turning to the other defendants, the Bradbury Estate Company and Bradbury Company (designated as the "Bradbury Interests"), it is contended that the evidence is insufficient to support a finding to the effect that such defendants are the owners of 10/11 of 1/5 of the waters collected and diverted by the city. It appears that in the year 1900, the city and the Bradbury interests entered into an agreement respecting a division of the water flowing in the main pipe line of the city, at some distance below the land of plaintiff. Such contract, after reciting that there was some dispute between the parties in respect to such water, provided that it should be divided in the proportion of 1/5 to the Bradbury interests and 4/5 to the city. Since that date the evidence shows that the Bradbury interests have been taking such water and using it to irrigate their lands some two miles away and outside the limits of the city. The contract further provides that the city "shall have the sole management and control of all of the waters of said Sawpit canyon and of the conduits and pipe lines through which the same are conducted, and the canyons and sources tributary thereto". Considering the contract as a whole, it was quite clearly the intent of the parties that the city should act as the agent of the Bradbury interests in the matter of the appropriation, collection, diversion and delivery of such waters to the point where they were divided. "It is not necessary that the person claiming title by adverse possession should have been in personal occupation of the land. Possession by an agent or by a tenant under him inures to his benefit and satisfies the requirements of the statute of limitations." 2 C.J., p. 73, § 48. By analogy, the same rule would apply to the acquisition of a prescriptive title to the use of the waters of a stream. The act of the agent is the act of his principal. The evidence shows without dispute that the Bradbury interests had diverted and put their share of the water to a beneficial use over forty years prior to the commencement of the action, and that such diversion and use had continued without interruption ever since. The evidence shows that such user was adverse to plaintiff for more than five years preceding the commencement of the action. Plaintiff testified that he first became familiar with the pipe line across his land in 1922, and that he had become familiar with said land generally in 1916. The diversion point in the pipe line for the share of the Bradbury interests was distant about one mile below his land. The contract with the city was authorized by a resolution of the city, and was therefore a matter of public record. Under such circumstances we are of the opinion that the court was fully justified in finding

that the Bradbury interests have used the amount of water claimed by them adversely for over a period of five years, and that they therefore have acquired a prescriptive right to the use of such waters.

[15] It is urged by appellant that the Bradbury interests take their water out of the stream at a point below his lands, and therefore, as against his riparian rights, no prescriptive right can be acquired by them. This is the general rule, but the facts are that the water is actually abstracted from the stream at points above plaintiff's land. The rule is not applicable.

[16, 17] Appellant contends that there should have been some adjudication in respect to his riparian rights to the surplus waters of the drainage area. It appears that during the annual rainy season there is a considerable flow of water through plaintiff's land. This flow is what is left after the city has abstracted its entitlement under its prescriptive right. That riparian rights attach to such waters, there can be no doubt. Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 P. 607. The court should have found the amount of such surplus water that plaintiff could have put to a reasonable and beneficial use upon his property. The facts are undisputed. There are fifty acres of land which can be cultivated, and which require one miner's inch of water to irrigate each five acres thereof. In other words, plaintiff can make a beneficial and reasonable use of ten miner's inches of water. The finding that only ten acres of land are suitable for cultivation has no support in the evidence. The findings will be modified to conform to the undisputed facts stated.

[18] The judgment was that plaintiff take nothing. This was erroneous. Plaintiff was entitled to an adjudication of all his riparian rights, including such rights in respect to the waters of the stream which would flow through his property after defendants had exhausted their prior right. Since the adoption of section 3, article XIV of our Constitution, it is the rule that the trial court must find expressly the quantity of water reasonably required by the riparian owner. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. 205 Cal. 6, 269 P. 525. The city's diversion points are all above the property of plaintiff. During the summer months, and occasionally in other months, there is no water whatever flowing in the stream. The city, at those times, takes all of the water. Plaintiff is clearly entitled, as a riparian owner, to use such waters, or a portion thereof, as flow past the city intakes and down through his property. This would not apply to such water as is voluntarily released by the city on occasions when the water is unfit for municipal use. The court states several times in the findings that it makes no adjudication of the rights of "surplus waters". That finding should be stricken out, and the judgment amended so that it will adjudicate such rights. The findings, as so amended, will support such amended judgment.

While we have stated that the judgment may be supported also by the finding that a public use had intervened, this obviously has no reference to the rights asserted by the Bradbury interests, as these defendants cannot invoke that doctrine, but must rely wholly upon their prescriptive right. We might also add that although, as to the city, the finding would support the judgment, the modification of the findings referred to would still have to be made. The extent of the right and taking would have to be more definitely fixed, and the riparian rights of plaintiff would still have to be adjudicated.

The second action is one to quiet title to a one-fourth interest in those waters which originate in, or flow through the east half of the southeast quarter of section 12, township 1 north, range 11 west, S.B.M. That land adjoins plaintiff's property on the north, and the water-way through it is known as "Maple Canyon". Such waters as flow down that canyon flow into Sawpit canyon creek, and through plaintiff's land. The waters of Maple canyon form part of the drainage area involved in the first action. What we have said in respect to the latter action is equally applicable to this action. The answers, findings and judgment are substantially the same in each case. We see no reason for discussing the second case further.

We do not deem it necessary to order a retrial of the issues involved. The ends of justice can be best subserved by ordering a modification of the findings, conclusions of law, and judgment.

It is therefore ordered that the judgment in each action be reversed, and that the trial court enter findings and judgment in accordance with this opinion. Each party will pay his own costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

## In re KEET'S ESTATE.

## FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. REED et al.

L. A. 16698.

Supreme Court of California.

March 30, 1940.

Rehearing Denied April 29, 1940.

1. Trusts ⇐194

A petition of testamentary trustee for instructions and authority to sell stock was a distinct and independent proceeding and the order of court authorizing sale was "appealable". Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Trusts ⇐194

Where no appeal was taken from order authorizing testamentary trustee to sell stock, it became a "final determination" of the matters adjudged with the force and effect of a "final judgment".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Determination" and "Final Judgment".

3. Trusts ⇐194

Where, in proceeding by testamentary trustee for instructions and authority to sell stock, probate court authorized sale of stock, objection to testamentary trustee's current account on ground of lack of power in trustee to sell stock constituted a "collateral attack" on the original order authorizing sale so that any attempt to show mere error of court was unavailing. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

4. Trusts ⇐194

Where no appeal had been taken from order of probate court authorizing the sale of stock by testamentary trustee, the judgment was conclusive unless its invalidity appeared on judgment roll. Probate Code, § 1240.

5. Trusts ⇐194

Where probate court had jurisdiction of parties and subject matter on testamentary trustee's petition for instructions and for authority to sell stock, order of probate court authorizing sale was "res judicata" on the issue of power to sell, even if court erroneously authorized the sale, in the light of the language of the will, and decree of distribution and lack of any sufficient showing of emergency arising from changed conditions justifying deviation from trust provisions. Probate Code, § 1120.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Trusts ⇐194

Where testamentary trustee's powers were derived from decree of distribution, the meaning and effect of its provisions were necessarily in issue in proceedings by testamentary trustee for instructions and for authority to sell stock even though petition did not specifically request construction of the decree of distribution. Probate Code, § 1120.

7. Judgment ⇐713(2)

The scope of a judgment when collaterally attacked is not limited to the factual or legal points expressly urged by counsel or considered by the court, but it extends to matters which could have been raised and considered in the particular proceeding under the particular pleading.

8. Trusts ⇐194

Where power of testamentary trustee could be derived only from a decree of distribution, probate court in granting authority to trustee to sell stock necessarily decided that decree of distribution permitted such sale or that legal doctrine of deviation in emergency and exception implied by law in any trust instrument permitted it.

9. Judgment ⇐501

A decision erroneously made by court acting within its jurisdiction can be corrected only by direct attack as by appeal, and, when the opportunity for direct attack is gone, the judgment can no longer be questioned.

10. Trusts ⇐178

Petition of testamentary trustee for instructions regarding administration of trust need not be in any particular form. Probate Code, § 1120.

11. Judgment ⇐475

Decrees of probate court in matters which are clearly within its statutory grant of jurisdiction have the same effect and are supported by the same presumptions on collateral attack as the judgments of a court of general jurisdiction.

**12. Trusts ⇐194**

A petition of a testamentary trustee for instructions and for authority to sell stock need not contain allegations of jurisdictional facts. Probate Code, § 1120.

**13. Trusts ⇐194**

Where probate court authorizing sale of stock by testamentary trustee had jurisdiction of parties and subject matter, alleged failure of petition for instructions and authority to sell to allege jurisdictional facts did not render order authorizing sale subject to collateral attack.

**14. Judgment ⇐18(2), 487**

Failure to state a cause of action is not a jurisdictional defect and cannot be a ground of collateral attack.

---

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceedings in the matter of the estate of Walter S. Keet, deceased, wherein the Farmers & Merchants National Bank of Los Angeles, as trustee of the trust created under the last will and testament of Walter S. Keet, deceased, filed a current account and report which was objected to by Georgia Keet Young Reed and another. From a decree of the probate court disallowing a portion of the current account and report, the testamentary trustee appeals.

Judgment affirmed in part and reversed in part with directions.

Rehearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

For prior opinion, see 91 P.2d 944.

Chenoweth & Whitehead, Morton L. Barker, Lawler & Felix, and Lawler, Felix & Hall, all of Los Angeles, for appellant.

Walter E. Drobisch, of San Francisco, Frank G. Finlayson, James S. Bennett, and Hubert T. Morrow, all of Los Angeles, John A. Hewicker, of San Diego, and George I. Devor, George L. Reimbold, Overton, Lyman & Plumb, Swarts & Tannenbaum, Howard F. Shepherd, Ben W. Utter, M. J. Rankin, Milo V. Olson, Loyd Wright, Charles E. Millikan, and S. Earl Wright, all of Los Angeles, amici curiæ.

Howard & Littlefield, Frederick L. Howard, and Forrest E. Littlefield, all of Hollywood, for respondents.

Newby & Newby, of Los Angeles, for respondent Salvation Army.

GIBSON, Justice.

This is an appeal from a decree of the probate court disallowing a portion of a current account and report of a testamentary trustee.

Walter S. Keet died August 13, 1926, leaving respondent, his widow, surviving. His will, admitted to probate September 13, 1926, created trusts in a part of the estate, which trusts were embodied in the decree of distribution made November 14, 1927.

The relevant trust provisions of the will as contained in the decree of distribution were as follows: (1) A general trust was created, to collect and accumulate the income of most of the property until a future date. The trustee was given broad powers of management, with right to sell and reinvest. (2) Next, the trustee was directed to pay to a Mrs. Emma Hubbard the net income from certain specified property. (3) The provision involved herein then follows: "Said trustee shall set apart as a separate and special fund all common stock belonging to decedent in the United Steel and Wire Company of Battle Creek, Michigan, and shall pay to said Georgia S. Keet, widow, the net income derived therefrom during her natural lifetime—and shall pay to said widow all dividends accruing upon said stock from the date of death of the decedent herein; and upon the death of said widow, this separate and special trust fund shall become a part of the general trust fund of said estate."

Leslie Clawson, the named trustee, subsequently resigned, and was replaced by appellant bank. The new trustee treated the various trusts separately, and the only questions on this appeal arise in connection with its administration of the trust for respondent widow. At the time of its appointment, in March, 1928, the corpus of this trust consisted of 3240 shares of United Steel and Wire Company, appraised at $24,300. Later in 1928 the company split its stock, issuing two new shares in place of each old one, thus making 6480 shares in the trust.

In 1934 and the following year the trust investment officers of appellant on several occasions discussed the advisability of disposing of part of the stock, and the purchase of high-grade bonds, for diversification of investments. Investigations were made as to the price which might be obtained (the stock being unlisted), and finally in March, 1936, respondent was advised

that appellant's trust investment committee had decided to seek authority from the probate court to sell a substantial portion.

On May 7, 1936, appellant filed a petition under section 1120 of the Probate Code, entitled, "Petition for Instructions, for Authority to Sell Stock and for Authority to Invest Proceeds From Sale of Stock." In it the trustee alleged "that after careful investigation made by your petitioner, your petitioner has concluded that it is for the best interests of said estate and in order to bring about a more extensive diversification in the assets held by your petitioner, to sell approximately one-half of three thousand two hundred forty (3,240) shares of said common stock of the United Steel and Wire Company; that your petitioner desires this Honorable Court to authorize and direct your petitioner to sell said three thousand two hundred forty (3,240) shares of common stock of the United Steel and Wire Company on the open market at the current market price on the date of sale at a price not less than $7.50 a share." It was further alleged that the trustee desired authorization to invest the proceeds in national government, state or municipal bonds or such securities as are authorized as legal investments for savings banks.

Due notice of hearing was given, and respondent was fully informed of the time and purpose of the proceeding. She had a discussion with a trust officer of appellant prior to the hearing, at which she expressed objections, but declared that in view of the thorough investigation which was represented to have been made, she would not protest the sale if the trustee thought it was for her best interests. Thereafter on May 22, 1936, the court granted the petition and made its order authorizing the sale of 3240 shares at not less than $7.50 per share, and reinvestment of the proceeds in municipal bonds. The order recited that it appeared "to the best interests of said estate" that the trustee be authorized to make the sale and reinvestment. In the next few months appellant proceeded to sell to various persons who had bid on the stock as follows: To Mr. Genebach, president of the United Steel and Wire Company, 1000 shares at $9.75 per share; to a brokerage firm, 1000 shares at $14 per share; and to another brokerage firm, 1000 shares at $14⅜ per share. The balance of 240 shares was left unsold. Recommendations of substitute securities were made by the trustee to respondent, and her approval obtained, whereupon the bonds were purchased.

The change proved unprofitable. The stock kept on rising in value until in November, 1936, its market price was $19 per share. Substantial dividends were continued, and in 1937 another stock split-up of two shares for one was made. On the other hand, a premium had been paid for the municipal bonds, and their market value declined slightly. In figures, it was stipulated that at the time appellant filed its present account, in April, 1937, the value of the corpus was $106,050, and would have been $129,600 if the stock had been retained. It was also stipulated that respondent would have received an additional income of $2,034 in the accounting period if the sale had not been made.

On April 6, 1937, appellant filed its report and eighth current account as trustee, for the accounting period of March 8, 1936, to March 8, 1937. The sale and reinvestment was set forth, and prayer was made for the allowance of trustee's fees and attorneys' fees. Respondent filed objections to the account, alleging the loss of income, and after answer by appellant, a trial was had before a new judge. The court found that appellant trustee had sold the stock without authority to do so; that it had no power to reinvest the proceeds in the bonds which it purchased; and that it was chargeable with 6,480 shares (or 12,960 shares under the second split-up) of the stock of the company, at its market value of $129,600. The detailed conclusions of law filed by the court, which more fully disclose its theory, may be summarized as follows: The testator's object was to set aside a special trust fund for his widow in the common stock of this company, to be kept intact, and the income paid to her; that it was the testator's intention that it should not be sold for any purpose; that under the provisions of the decree of distribution the trustee had no power to sell that stock; that the petition filed by the trustee did not ask for a construction of the decree as to the trustee's power to sell, and that the other court in granting the petition did not determine or attempt to determine the powers of the trustee; that the court had no jurisdiction to change the terms and conditions of the decree of distribution, and that its order was in conflict with those terms and void. Accordingly, the present court made its

order disallowing the eighth current account with respect to the sale of stock and purchase of bonds, and adjudged appellant chargeable with the stock and liable for the difference in income. Appellant was ordered to file a corrected report and account. The request for trustee's fees was granted, but attorneys' fees in connection with the sale were denied. This appeal followed.

[1-4] It is apparent that the order of the lower court must be reversed, on well settled principles. Respondent's objection to the eighth current account on the ground mentioned, namely, lack of power in the trustee to sell the stock, constitutes a collateral attack on the original order authorizing the sale. The petition for instructions and authority to sell was a distinct and independent proceeding, and the order of the court was appealable. Prob. Code, sec. 1240. No appeal was taken, and consequently it became a final determination of the matters adjudged, with the force and effect of a final judgment. See Security, etc., Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St.Rep. 105; Baldwin v. Stewart, 218 Cal. 364, 23 P.2d 283. On a collateral attack, any attempt to show mere error of the court must necessarily fail. The judgment is conclusive unless wholly invalid on its face, that is, unless its invalidity appears from the judgment roll. Security, etc., Bank v. Superior Court, supra. The question then is whether respondent has succeeded in establishing the invalidity of the judgment so as to subject it to collateral attack.

[5] The first theory relied upon by respondent and the lower court is that the order was void because it purported to authorize an act—sale of the stock, in violation of the terms of the will and decree of distribution. We may here concede that there is grave doubt as to whether the general power of sale first given in the will was intended to apply to the special trust for respondent, in view of the testator's express direction that the stock should be set apart and the income paid to the widow. We may further assume, for the purposes of this appeal, that it was error for the court to order the sale in the light of the language of the will and decree, and the lack of any sufficient showing of emergency arising from changed conditions and justifying deviation from the trust provisions. See Security-First Nat. Bank v. Easter, 136 Cal.App. 691, 29 P.2d 422; Restatement, Trusts, sec. 167; note, 23 Cal.L.Rev. 86. Nevertheless, it was not impossible to construe the terms of the will and decree so as to make the general power of sale in the trustee applicable to this particular trust. It would also have been possible for the trustee, upon a proper showing, to secure permission from the court to deviate from express restrictions against sale. When appellant petitioned for instructions and authority to sell, it sought a judicial determination of its powers under the will, the decree, and the applicable law. The court, in granting the petition, made an adjudication of such powers. Its jurisdiction over such proceedings is established by section 1120 of the Probate Code, and appellant complied with all procedural requirements of the section. Having jurisdiction of the subject matter and of the parties, the order of the court, whether correct or not, became res judicata on the issue of power to sell.

[6-9] The fact that the petition did not specifically request a construction of the decree of distribution, but simply alleged that petitioner had concluded that it was for the best interests of the estate to sell and diversify investments, is not controlling. Since the trustee's powers were derived from the decree of distribution, the meaning and effect of its provisions were necessarily in issue in the proceeding. The scope of a judgment, when collaterally attacked, is not limited to the factual or legal points expressly urged by counsel or considered by the court; it extends to matters which could have been raised and considered in the particular proceeding under the particular pleadings. See Silverston v. Mercantile Trust Company, 18 Cal.App. 180, 122 P. 976. As applied to the instant case, since the powers of the trustee could be derived only from the decree of distribution, the court in granting authority to sell necessarily decided that the decree of distribution permitted such a sale, or that the legal doctrine of deviation in emergency, an exception implied by law in any trust instrument, permitted it. If the court reached its conclusion after a careful study of the decree, a full consideration of the evidence, and an examination of the relevant authorities, its decision would be entitled to great weight. If, on the other hand, as respon-

dent contends and the present lower court found, it did not even have the decree of distribution before it, and made its order without being fully advised in the matter, its decision would hardly be persuasive on appeal. But in either case, the most that respondent could show would be that the decision was erroneous, that is, that it decided the issue of power to sell, and decided it wrongly. Such legal error committed by a court within its jurisdiction can be corrected only on direct attack, as by appeal; and when the opportunity for direct attack is gone, the judgment can no longer be questioned.

The other contention of respondent and the lower court is that the first court, before which the original petition was filed, had no jurisdiction to determine the issue of power to sell, because the petition did not allege sufficient facts to give it jurisdiction under section 1120 of the Probate Code. The argument seems to be that though entitled "Petition for Instructions", it did not allege any doubt as to the trustee's power, nor did it seek any instructions, but merely requested authority to sell on the basis of the allegation of the trustee that it had concluded this would be to the best interests of the estate.

[10-12] It may be noted here that the basic assumption of this argument is wrong; the section requires no particular form of application, but merely states that the trustee may petition the court, from time to time, for instructions as to the administration of the trust. Moreover, the decrees of the probate court in matters which, like these, are clearly within its statutory grant of jurisdiction, have the same effect, and are supported by the same presumptions on collateral attack, as the judgments of a court of general jurisdiction. Allegations of the jurisdictional facts in the pleadings are therefore unnecessary. Wood v. Roach, 125 Cal.App. 631, 14 P.2d 170; Security, etc., Bank v. Superior Court, supra.

[13, 14] But there is another and simpler answer to this argument: the asserted defect in the petition is not, in truth, a failure to allege jurisdictional facts. The contention of respondent is that although the court had jurisdiction over the trust, the trustee, and the beneficiary, that is, the subject matter and the parties, the petition failed to state sufficient facts to warrant the granting of relief. Failure to state a cause of action is not, however, a jurisdictional defect, and cannot be a ground of collateral attack. Gillespie v. Fender, 180 Cal. 202, 180 P. 332; Christerson v. French, 180 Cal. 523, 182 P. 27; Behrens v. Superior Court, 132 Cal.App. 704, 23 P.2d 428.

The judgment, in so far as it disallows the report and account of the trustee and denies attorneys' fees, is reversed with directions to allow the report and account, and to award such attorneys' fees as the court may deem reasonable. That part of the judgment which allows trustee's fees is affirmed.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; CURTIS, J.

CARTER, Justice (concurring).

With some mental reservation I concur in the conclusion reached in the opinion of Mr. Justice GIBSON, which, as I understand said opinion, is predicated upon the proposition that the order of the trial court authorizing the trustee to sell the United Steel and Wire Company stock had become final and that it was not subject to collateral attack in the manner in which respondent sought to attack said order in this proceeding. From a strictly legal standpoint, this conclusion is inescapable.

However, the trial court found that the trust officers of appellant represented to respondent that they had made a full and fair investigation of United Steel and Wire Company and that there was something wrong with it, whereas, in truth and in fact, said trustee had not made a full and fair investigation and that such investigation if actually made would have revealed that said company was in a sound financial condition; that at the time the trust officers represented to respondent that the sale would be to her best interest, the trustee well knew that the sale of said stock would result in a loss of income and injury to respondent rather than benefit; that respondent relied upon the representations of the trustee, had no independent legal advice, and the trustee never suggested that she obtain it; that in relying upon the representation of the trustee, she did not contest the petition for leave to sell the stock; that she approved the subsequent purchase of bonds without knowledge of the loss that she was suffering. Respondent also asserts that the trustee did not inform her that any doubt existed

as to its power to sell the stock; that it concealed this doubt from the court by framing the petition in such a manner as to lead the court to believe that a general power existed and that the trustee was simply asking for instructions on a matter within the discretion of the trustee; and that in such proceeding it failed to disclose to the court the contents of the decree of distribution relative to the above-mentioned stock.

In my opinion the above-mentioned matters constitute sufficient grounds upon which respondent can obtain relief in a proper proceeding for the injury suffered by her as the result of the conduct above-narrated. There can be no question but that gross misrepresentation by a trustee, resulting in loss to a beneficiary, constitutes a breach of trust, justifying both removal of the trustee and damages for any loss suffered by the beneficiary. Such relief, however, must be obtained in an appropriate action by the beneficiary against the trustee. The original decree authorizing the sale of the stock would, of course, be res adjudicata on the power to sell the stock and would preclude any subsequent attack on the trustee's action on the theory of bad judgment in the matter, but it would not prevent a wholly distinct action for damages for actual fraud under the facts and circumstances claimed by respondent to have existed in connection with the transaction which is the subject of this controversy. In addition, there may be a further remedy for the alleged imposition practiced upon respondent and the trial court by the trustee in failing to disclose the source of its power and the doubt which existed as to its right to sell the stock. If respondent can make out a case of imposition upon the court amounting to extrinsic fraud, an independent action in equity could be brought to set aside the original decree authorizing the sale of the stock, without regard to lapse of time.

I deem it advisable to mention the foregoing matters because both the trial court and the District Court of Appeal held in favor of respondent in the case at bar, which is a persuasive indication to my mind that there is merit in respondent's claim that she suffered injury as a result of the improper conduct of the trustee, and I regret that because of the rules announced in the majority opinion, the redress to which respondent is entitled cannot be obtained in this proceeding.

## HAYS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. *

L.A. 17298.

Supreme Court of California.

March 28, 1940

Rehearing Granted April 26, 1940.

**Depositions ⇐71**

**Mandamus ⇐40**

**Where a defendant was cited to appear and show cause why she should not be required to give her deposition, and order to take her deposition was refused because case had been dismissed and appeal from judgment of dismissal was pending, after showing made on order to show cause, proceeding would partake of one in the nature of "contempt," and even if plaintiff was entitled to a subpoena to take defendant's deposition, that right was not defeated by dismissal, and showing was sufficient ex parte to justify issuance of subpoena, it did not follow that plaintiff was entitled as a matter of right to an adjudication in contempt nor to a writ of mandamus compelling the superior court to order defendant to give her deposition. Code Civ.Proc. §§ 1049, 2020, 2021.**

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt Proceeding".

CARTER, GIBSON, and EDMONDS JJ., dissenting.

---

In Bank.

Petition by Jack Hays against the Superior Court of the State of California, in and for the County of Los Angeles, and Robert Scott, Presiding Judge, for a writ of mandamus to compel the court to order Gertrude Temple to give her deposition as a defendant in an action in which petitioner was a plaintiff.

Peremptory writ denied.

Prior opinion, 92 P.2d 665.

William C. Ring, of Los Angeles, for petitioner.

John H. O'Connor, Co. Counsel for Los Angeles County, Douglas De Coster, Asst. Co. Counsel, Loyd Wright, and Charles E. Millikan, all of Los Angeles, for respondents.

PER CURIAM.

This is an application for the writ of mandamus to compel the respondent supe-

* For subsequent opinion see 105 P.2d 975.

rior court to order Gertrude Temple to give her deposition as a defendant in the case of Hays v. Temple et al., commenced in that court on October 7, 1936.

On March 14, 1939, said defendant and her codefendant G. F. Temple, served and filed a notice of motion to dismiss said action on the ground that the plaintiff had failed for more than two years to bring the action to trial. Pursuant to the notice the motion was heard and granted on March 22, 1939. Judgment of dismissal was entered March 31, 1939. On that day the plaintiff, petitioner here, served and filed a proposed bill of exceptions and on the next day, April 1, filed a notice of appeal from the judgment of dismissal. Settlement of the proposed bill was pending when the present proceeding was commenced.

On March 17, 1939, or three days after the notice of motion to dismiss was filed, the plaintiff, on affidavit, applied to said court for an order to take the deposition of Gertrude Temple. The order was issued commanding her to appear at a designated hour and place on March 30, 1939, to give her deposition in said action. She appeared on April 8, to which time the matter had been continued, but refused to be sworn or to testify on the ground that the action had been dismissed. She was then cited to appear and show cause why she should not be required to give her deposition. Upon hearing the court ruled that "The proposed order is refused because the case has been dismissed, and the judgment pursuant to the order of dismissal is now pending on appeal, and that the taking of such deposition should be deferred until the determination of said appeal, for the convenience of the parties and in the interests of justice."

The present proceeding followed.

In response to the alternative writ the respondent court filed a general demurrer to the petition and an answer in which it was alleged among other things that on March 25, 1939, the petitioner commenced another action in said superior court, No. 437973, and entitled Jack Hays, Plaintiff, v. Gertrude Temple and S. F. Temple, Defendants; that said action is for damages for breach of contract, is between the same parties and is based on the same cause of action as the one involved in the action dismissed by order of court on March 22, 1939.

It is the petitioner's contention that he was entitled as a matter of right (1) to the issuance of the order and subpoena to take the deposition of Gertrude Temple; and (2) to compel the witness to be sworn and to testify notwithstanding the fact that in the meantime the action had been dismissed.

It may be assumed for the purposes of this proceeding that the petitioner was entitled, upon a proper showing, to the issuance of a subpoena to take the deposition of Gertrude Temple, secs. 2020, 2021, 1049, Code Civ.Proc., and that this right was not defeated by the subsequent order of dismissal that had not become final. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933. It may also be assumed that upon the application therefor the showing was sufficient ex parte to justify the order for the issuance of the subpoena. But from these assumptions it does not follow that the petitioner was entitled, as a matter of right, to an adjudication in contempt of the witness who refused to answer. Such a right would result, if at all, from the showing made on the order to show cause. Thereafter, the proceeding partakes of one in the nature of contempt. Burns v. Superior Court, 140 Cal. 1, 73 P. 597; Crocker v. Conrey, 140 Cal. 213, 73 P. 1006. If a valid reason be interposed why the witness should not be compelled to answer, the court, in the exercise of a sound discretion, may refuse to employ the processes of contempt to compel the witness to answer. The court's determination must depend on the particular facts and circumstances of the case.

It should be noted that the respondent court did not refuse unreservedly to compel the witness to answer, but only "that the taking of such deposition should be deferred until the determination of said appeal" from the judgment of dismissal.

In determining whether the respondent court abused its discretion in refusing to compel the witness to answer as demanded by the petitioner, it is apparent that the respondent court based its order of abatement of the contempt proceedings on the grounds that the original action of Hays v. Temple was one for money had and received and for an accounting and that in appraising the rights of the petitioner under sections 2020 and 2021 of the Code of Civil Procedure (see Pollak v. Superior

Court, 197 Cal. 389, 393, 240 P. 1006), the ends of justice would be promoted by a delay in the taking of the deposition until it should be determined on appeal whether the plaintiff had any case in which the deposition could be used.

On the record before the trial court it cannot be said that the petitioner had shown such a clear right to an order compelling the witness to answer without delay as would justify the control of the action of the trial court by means of the writ of mandamus.

In addition to the showing in favor of the trial court's action, it appears by the answer of the respondent in this proceeding that a second action between the same parties and involving the same subject matter was commenced in said court three days after the original action was ordered dismissed. If the judgment of dismissal be affirmed, clearly the petitioner would have no right to compel the witness to answer in the dismissed action. If the judgment of dismissal be reversed, it cannot now be assumed that the trial court would then refuse to enforce such rights as the petitioner may then appear to have.

The peremptory writ is denied.

CARTER, Justice.

I dissent.

As I understand the opinion approved by a majority of this court, the petitioner had the right to take the deposition of defendant, Gertrude Temple, notwithstanding a judgment of dismissal had been entered in the action in which the deposition was sought to be taken and an appeal had been taken from said judgment, but the majority opinion appears to hold that the defendant was justified in refusing to answer questions propounded to her on the taking of said deposition, and the trial judge was justified in refusing an order to petitioner directing said defendant to answer said questions upon the ground that the deposition might be taken at a later date.

In my opinion, the trial judge had no discretion in this matter, and it was his plain duty to make the order requested by petitioner directing the witness to answer any questions which might be propounded to her on the taking of her deposition which were germane to the issues in the case. This view is clearly in accord with the provisions of the Code of Civil Procedure authorizing the taking of depositions, and with all of the cases on the subject, with the exception of Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 56 P. 2d 1283. The case just cited is contrary to all of the other cases dealing with the subject, and in my opinion the rule announced therein is unsound and should not be followed.

I think it is obvious that section 2021 of the Code of Civil Procedure confers upon a litigant an absolute right to take depositions in the cases provided for therein. By the express provisions of this section such depositions may be taken *"at any time after the service of the summons or the appearance of the defendant"*, which has been construed to mean *at any time before the judgment becomes final.* San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933. No discretion is conferred upon a trial court to determine when a litigant may take a deposition, and it is a matter over which the trial court has no control whatever, except to use the process of the court to enforce the provisions of the code when necessary to aid the party who is seeking to obtain the deposition.

It is well recognized by trial lawyers that the taking of depositions long prior to the time when they are to be used is essential to the proper and successful handling of cases, and the legislature in its wisdom saw fit to confer upon litigants the absolute right to take depositions *at any time they see fit after the service of summons or the appearance of the defendant in pending actions.*

The effect of the decision of the District Court of Appeal in the case of Patrick Farms, Inc., v. Superior Court, supra, and the majority opinion of this court in the case at bar, is to confer upon a trial court the power to specify the time when a litigant may take a deposition in certain cases, or stating it another way, to require a litigant to defer the taking of a deposition to a time when it appears to a trial court reasonable and proper that such deposition be taken. In other words, these decisions interpret section 2021 of the Code of Civil Procedure to read: "The testimony of a witness in this State may be taken by deposition in an action at any time after service of the summons or the appearance of the defendant, *except in cases where a trial court for good cause shown shall otherwise specify.*" (Italicized portion added.) These decisions amount to nothing less than judicial legislation.

They read an exception into section 2021 of the Code of Civil Procedure which is not there and which should not be there.

A litigant should not be subjected to the uncertainty of a discretionary ruling of a trial judge every time he attempts to procure evidence by deposition which the litigant thinks is essential to the proper preparation or presentation of his case.

The administration of justice is already so cumbersome and burdensome that poor litigants have great difficulty in meeting the requirements now imposed upon them in the presentation of their cases to our courts, and if we are to lay down a rule which will enable one who desires to conceal and suppress evidence to successfully resist the taking of his deposition by the refusal of a trial judge to exercise his discretion in favor of the taking of such deposition, we are increasing such burden without in any way improving the administration of justice. In fact, the administration of justice is usually aided by requiring full disclosure of all facts within the knowledge of either party to the litigation. Furthermore, it quite often happens, and it has been approved as proper legal procedure, that depositions may be taken to determine whether it is advisable to further prosecute an action, either from the standpoint of whether the party seeking to take the deposition can prevail in the action, or can satisfy any judgment which he might recover if he does prevail. Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605.

To say that the effect of the majority opinion in the case at bar does not deny a litigant his statutory right to take a deposition "at any time after service of the summons or the appearance of the defendant" is to disregard the inevitable consequences of long delays in securing evidence. It may be that if and when the judgment of dismissal in the case at bar is reversed, Gertrude Temple may be deceased, or out of the jurisdiction where it would be extremely difficult or even impossible to secure her deposition. The fact that the case involves an accounting and that the plaintiffs right to an accounting must be first determined before an accounting can be ordered, does not change the situation. If such a rule is to be invoked, then in every case where certain issues must be determined before evidence can be offered relating to other issues in the case, a litigant would be barred from taking depositions relating to any subject matter except the preliminary issues until after such issues were determined; in other words, in a case in eminent domain a litigant would be barred from taking the deposition of a witness on the issue of damages until after the issue of necessity had been determined, and in a personal injury case a litigant would be barred from taking a deposition relating to the nature and extent of the injuries suffered by the plaintiff until the issue of liability was determined. A complete answer to the reasoning advanced in the majority opinion in the case at bar and in the opinion in the case of Patrick Farms, Inc., v. Superior Court, supra, is that no power, authority, or discretion is conferred upon the trial court to limit or restrict the right of a litigant to the taking of depositions relating to any issue in an action until some other issue is determined, and since the right to take a deposition in this state is purely statutory, the litigants should be permitted to exercise the right conferred upon them by statute without being hampered by restrictions imposed by the court in derogation of express statutory authority.

It has been repeatedly held that when a litigant follows the procedure provided for in the Code of Civil Procedure for the taking of a deposition and the witness refuses to answer proper questions propounded to him on the taking of his deposition, and such refusal is certified to a judge of the superior court, such judge has no discretion to refuse to exercise the powers which the law has invested in him so far as necessary to secure to the litigant the right which the law confers upon him to take the deposition of a witness. 9 Cal.Jur., p. 403, sec. 8; p. 407, sec. 10; Burns v. Superior Court, 140 Cal. 1, 73 P. 597; Crocker v. Conrey, 140 Cal. 213, 218, 73 P. 1006; Scott v. Shields, 8 Cal.App. 12, 96 P. 385; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Kibele v. Superior Court, 17 Cal.App. 720, 121 P. 412; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879.

There is no basis whatever for the contention that a trial court should be invested with a discretion which it might exercise to relieve a witness from giving his deposition because the action in which the deposition is taken may not be brought to trial

for an indefinite time, or may never be brought to trial, as no such discretion is provided for in our statutes.

It is obvious that the legislature did not see fit to include in the statutory provisions authorizing the taking of depositions, a safeguard against a litigant abusing the privilege thus granted, as the expense to which a litigant is subjected in the taking of a deposition is a sufficient deterrent to restrain the use of the privilege for mere personal gratification. This thought is clearly expressed by Chief Justice Beatty in the case of San Francisco Gas & Electric Co. v. Superior Court, supra. At page 37 of 155 Cal., at page 361 of 99 P., 17 Ann.Cas. 933, of the opinion in that case, he said: "The only substantial argument against this construction of statute is that it enables a contentious litigant to subject the successful party to an action to great and unnecessary expense in the taking of depositions pending a frivolous appeal. This objection, however, does not seem to have been deemed by the Legislature sufficiently grave to prevent the enactment of a statute which easily admits of the same abuses, even when restricted in its application to pending issues, and to controversies which may never reach an issue. There seems also to be less reason to apprehend the inconveniences suggested when it is remembered that the party taking depositions in a case like this must pay the costs of the proceeding without hope of recovering them back except in the event of a reversal of the judgment or order, and not then unless the final judgment is in his favor. Moreover, the respondent may, in case of an appeal manifestly frivolous, ignore the whole proceeding to take new depositions, or, if he deems it unsafe to omit the employment of counsel to attend and cross-examine, he may invoke the power of this court to impose an adequate penalty, on affirmance of the judgment, to recompense him for the unnecessary expense to which he has been subjected in consequence of a frivolous appeal. In view of these considerations, it is not to be feared that a liberal construction of the Code provisions in question will result in serious abuses."

Furthermore, the 1939 legislature, St. 1939, p. 1817, added section 1032a to the Code of Civil Procedure, which provides that the prevailing party may recover as costs, any expenditures he is required to make for a copy of any depositions taken in an action, which furnishes an added deterrent against a litigant resorting to the practice of taking depositions which are not necessary for the proper presentation of his case.

The majority opinion appears to confuse the procedure taken by petitioner in the case at bar with a contempt citation against the witness. In this, it is clearly erroneous, as the order prayed for in the trial court was that the witness be directed to give her deposition. If she thereafter refused to appear and be sworn, or give her deposition, and she was cited to show cause why she should not be punished for contempt of court for such failure, she would then have the right to present such defense as might be available to her, such as illness, or the necessity that she be at some other place at the time she was directed to submit to the taking of her deposition. On the hearing of such citation, of course, the trial court would have discretion to determine whether or not she was guilty of contempt of court, but such is not the situation in the case at bar. In my opinion, the witness furnished no justifiable excuse for her refusal to give her deposition, and it was the unquestionable duty of the trial judge to make an order directing her to submit to the taking of her deposition or be adjudged guilty of contempt of court.

In view of what I have stated above, the petitioner is clearly entitled to a writ of mandate and a peremptory writ should issue forthwith.

I concur: GIBSON, J.

EDMONDS, Justice.

I concur in the conclusion that the petitioner is entitled to a peremptory writ of mandate.

## In re GAINES' ESTATE.

## ANDREWS v. CALIFORNIA TRUST CO.

L.A. 17037.

Supreme Court of California.

March 30, 1940.

Rehearing Denied April 29, 1940.

**1. Joint tenancy ⇐3**

The signing of joint tenancy cards by the parties with reference to both safe deposit box and bank accounts would, standing alone, be sufficient to create "joint tenancies", that is, joint interest with right of survivorship to the whole. Gen.Laws 1937, Acts 652, § 15a.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancies".

**2. Evidence ⇐314(1)**

Witnesses' testimony as to statements made by another is "hearsay", and if offered to prove the facts asserted, is prima facie within hearsay rule and inadmissible unless such testimony comes under an exception to the rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

**3. Evidence ⇐200**

Ordinarily, statement describing another's declaration is not regarded as "admission" of the fact asserted by the other, since one does not admit everything he recounts or describes merely by reason of the relating of them.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

**4. Evidence ⇐241(1), 249(1)**

A statement of another is an "admission" if person making statement is in privity with party against whom statement is offered, as in case of agency or partnership, and if statement is adopted by the party as his own, either expressly or by conduct.

**5. Evidence ⇐220(2)**

Declarations of third person made in presence of party become "admissions" of party by silence of party.

**6. Evidence ⇐220(1)**

A surviving joint tenant's repeating of deceased joint tenant's declaration that safety deposit box and bank accounts were placed in joint tenancy to facilitate handling of deceased tenant's estate after deceased tenant's death, was an "admission" against surviving tenant, where surviving tenant did not challenge declaration.

**7. Appeal and error ⇐1008(1)**

In proceeding involving title of surviving joint tenant to bank accounts and contents of safe deposit box which had been placed in joint tenancy by deceased joint tenant, determination of intention of deceased tenant from conflicting statements was for trial court.

**8. Evidence ⇐384**

The "parol evidence rule" is not a rule of evidence but is rule of substantive law, and does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on probative value of such evidence, or policy of its admission.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

**9. Evidence ⇐397(2)**

The "parol evidence rule" as applied to contracts is that as a matter of substantive law, a certain act embodying the complete terms of an agreement in writing becomes the contract of the parties, and extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.

**10. Evidence ⇐397(2)**

The "parol evidence rule" comes into operation when there is a single and final memorial of understanding of the parties, in which event prior and contemporaneous negotiations, whether oral or written, are excluded. Civ.Code, § 1625; Code Civ.Proc. § 1856.

**11. Mortgages ⇐37(2)**
**Trusts ⇐43(3)**

Though a writing purports to make an absolute transfer, extrinsic evidence may be offered, under exception to hearsay rule, of collateral agreement to hold property as security or in trust.

**12. Trusts ⇐25(1)**

A "trust" is not created, notwithstanding intention to create trust, where there is failure to disclose purpose of trust or beneficiary thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

**13. Trusts ⇐44(3)**

Proof that great uncle placing bank accounts and safety deposit box in joint tenancy with great nephew, intended to create trust, must be clear and convincing in order to overcome legal effect of joint tenancy agreements.

**14. Trusts ⇐44(1)**

Evidence that great nephew told executor of estate of deceased great uncle that great uncle stated that great uncle was placing bank accounts and safety deposit box in joint tenancy with great nephew to facilitate handling of estate after death of great uncle, was insufficient to establish that great uncle intended that great nephew should hold bank accounts and safety deposit box in trust for estate.

**15. Trusts ⇐94**

Where attempt is made to create trust, and basic elements of intent, purpose and subject matter are present, but trust is unenforceable because of statute of frauds or some other invalidating cause, trustee cannot keep the property individually but will be declared a constructive trustee.

**16. Joint tenancy ⇐3**

A joint tenancy agreement respecting bank accounts made in form contemplated by statute, and in absence of fraud or undue influence, cannot be challenged by evidence of intent. Gen.Laws 1937, Act 652, § 15a.

CURTIS and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Charles A. Gaines, also known as C. A. Gaines, deceased, wherein Frederick Andrews and the California Trust Company, a corporation, coexecutors, filed separate accounts, and each party filed exceptions to the account of the other. From an order settling and approving the account of the California Trust Company and denying approval of the account of Frederick Andrews, Frederick Andrews appeals.

Reversed.

Rehearing denied; HOUSER, J., dissenting.

Prior opinion 92 P.2d 646.

J. B. Irsfeld, Douglas Fawcett, and James B. Irsfeld, Jr., all of Los Angeles, for appellant.

Eckman & Lindstrom, of Los Angeles, amici curiae.

George E. Farrand, Edward W. Tuttle, Farrand & Slosson, Leonard B. Slosson, and Swanwick, Donnelly & Proudfit, all of Los Angeles, and Clarence Thomason, of North Hollywood, for respondent.

Dryer, Castle & Richards, of Los Angeles, amici curiae.

GIBSON, Justice.

This is an appeal by Frederick Andrews, coexecutor of the estate of Charles A. Gaines, from a decision of the probate court after trial of issues arising upon exceptions to the accounts of the executors. The purpose of the proceedings was to determine the title to certain personal property comprising bank accounts, corporate stock, promissory notes and a few other items of personal property.

The decedent, Charles A. Gaines, was the great uncle of appellant Andrews. Gaines came to California in 1918 with a substantial fortune. In 1923 he established an office in Los Angeles where he took care of his property and investments. Appellant, who lived in Ohio, for some years saw his uncle only on visits, but in October of 1933 came to California where he operated a small business and saw him frequently. He performed a few personal services for decedent, but did not transact any business for him, nor did they discuss the estate.

In January, 1934, decedent went to the Seaboard Bank and there procured a form of joint ownership contract covering a safe deposit box. The bank clerk at this time explained the nature of the contract and the effect of the survivorship clause. Decedent signed the card, and later requested appellant to come with him to the bank and put his signature on it. Appellant testified he could not recall any definite conversation taking place at that time, but declarations made by him prior to the trial, as well as his testimony show that he believed that his uncle was merely arranging for him to have access to the safe deposit box in order to make it easier to handle the estate.

Appellant did not see the box itself at this time. He knew nothing about its contents until some months later, when, at his uncle's request, he put some papers into it and noticed some Gillette Safety Razor Company stock there. Appellant never used the box himself, paid no rent on it, never inquired as to its contents, received none of the income from the stock kept

therein and in short, in his own language, "never gave a thought to it" from the time he signed the card until some months after his uncle's death.

In September, 1934, decedent again called upon appellant to go with him to the bank. This time he signed joint tenancy cards for two bank accounts. Appellant testified that there was no special conversation about the purpose of the signing but respondent offered evidence of declarations made by appellant, indicating that he understood decedent's purpose was to facilitate the handling of the estate after his death. However, when decedent obtained the cards, their nature and effect were explained to him by bank employees.

In December, 1934, appellant went back to Ohio to live. Previous to this he gave his safe deposit key to his uncle. In October, 1936, his uncle died, and respondent California Trust Company, coexecutor under his will, delivered to appellant an envelope found in the decedent's safe and addressed to appellant. The envelope contained the latter's safe deposit key and a letter reading as follows:

"Dear Freddie:

"Enclosed please find the key to my safe deposit box in the Seaboard Nat. Bank, Hollywood Blvd. at Whitley, which is in our joint names, said box contains most of my securities, stocks, deeds, etc. from my bank account which is in the name of my wife and self you can draw checks for your and her allowance as provided by my will, all other beneficiary payments to be held up until my estate is settled. You can immediately get in touch with California Trust Company, co-executor and start work on settling the estate. Sincerely, Uncle C. A. Gaines."

Thereafter appellant participated in various conferences with officers of respondent trust company and its attorneys, at which time the will and its provisions were considered and plans for the administration of the estate discussed. During these conferences appellant repeatedly expressed the opinion that his uncle did not intend that the property should go to him individually. When the parties opened the safe deposit box and took out the contents, appellant permitted them to be held by respondent trust company, which was the special administrator, and respondent collected the income from the stock and included all of the contents of the safe deposit box in its account as special administrator, with no objection from appellant. Proceedings in administration thereafter went on in the usual manner.

In March, 1937, appellant, who had previously been represented together with the trust company by one firm of attorneys, retained new counsel to represent him individually. With the appointment of his new counsel appellant for the first time made a personal claim to the bank accounts and the safe deposit box as a surviving joint tenant. In order to test his right, a suit for declaratory relief was brought by appellant against respondent California Trust Company, but this was voluntarily dismissed after decision upon demurrer, on the ground that the probate court had exclusive jurisdiction. The issue was then raised in the following manner: Respondent California Trust Company filed its account as coexecutor and charged the executor with those items of personal property, namely, the bank accounts and the contents of the safe deposit box. Appellant took exceptions to the account asserting his claim of ownership to this property. Appellant filed his account as coexecutor in which he did not include this personal property, but set forth his claim of ownership. To this account respondent filed its exceptions. Thus the issue of title to the property was raised. Later by amendment to its exceptions to conform to proof, permitted over objection by appellant, respondent set forth the specific contention that there was never any intention on the part of decedent to make a gift of the property but that the parties entered into the arrangement merely to facilitate administration of the estate after the death of the decedent.

After trial the probate court decided in favor of respondent and against appellant on the issue presented. The court specifically found that decedent had made the arrangement for the signing of the joint tenancy cards for both the safe deposit box and the bank accounts merely for the ease and convenience of appellant as executor in obtaining possession of the property and administering it; that it was not intended thereby to make a gift to appellant of the property or money; and that it was the intention and understanding of both parties that if appellant survived the decedent he would take and hold all of the property in trust for the estate. The issue presented

by this appeal is whether these findings are supported by substantial and competent evidence.

[1] The joint tenancy cards signed by the parties with reference to both the safe deposit box and the bank accounts would, standing alone, be sufficient to create joint tenancies, that is, joint interest with right of survivorship to the whole. Cases wherein such agreements have been upheld are frequent. See, for example, Wallace v. Riley, 23 Cal.App.2d 654, 74 P.2d 807; Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361; Young v. Young, 126 Cal.App. 306, 313, 14 P.2d 580. The attack upon the formal writing is based upon the theory that the decedent and appellant did not intend to create a joint interest in property nor did they enter into a contract; but that they merely sought to make a convenient arrangement for access to and handling of the property, or a transfer in trust for the benefit of the persons entitled to the property under the will, and not an absolute gift of the property itself.

The testimony chiefly relied upon was given by officers of respondent trust company, to the following effect: Appellant, after decedent's death, told them that decedent stated at the time the cards were signed that this was being done to facilitate handling of the estate after his death. Thus, J. C. Seaman, assistant trust officer, testified that at one conference appellant related that his uncle called him to the bank without telling him the object of the trip, and asked him to sign a safe deposit box card; and that "his uncle had said that he was fixing things this way to make it easy for Mr. Andrews to administer his uncle's estate, because his uncle had told him that he had made him executor of his last will. We then questioned Mr. Andrews in regard to the bank accounts, and he said they were signed up similarly at later dates, and his uncle had told him that he was fixing the bank accounts the same way as the box, for the same purpose". The witness further testified as to appellant's story: "He did not know until he got to the bank, he told us, just what was required of him, but he went along in accordance with his uncle's wishes, and it was only when he was asked to sign the card that his uncle said, 'Fred, I want you to sign this so that you can take care of my affairs after I am gone. You know I told you I have made you executor of my will' ". B. L. Smith, vice-president of respondent trust company, testified to the same effect.

Appellant gave a different version of these conversations, consistent with his other declarations and conduct. He testified that his uncle made no direct statements of his intention, and that in relating the circumstances referred to he, appellant, was merely offering his own honest belief as to what his uncle probably had in mind. Appellant's bewilderment at his uncle's unexplained actions clearly appears in the testimony of all of these witnesses, and his expressions of opinion seem to be reasonable and natural. But in view of the court's findings, we may, for the purposes of this opinion, accept the version of respondent, and proceed to determine the important question of the admissibility of this evidence.

[2, 3] First, it is hearsay, the witnesses testifying to statements made by another. Second, it is offered to prove the fact asserted, that is, the purpose of the joint tenancy agreements; so it is prima facie within the hearsay rule and inadmissible unless it comes under one of the exceptions. Third, the witnesses were not testifying to a declaration made to them by decedent, but to a declaration made to them by appellant. It is clear, then, that if the evidence was properly received at all, it came in as an admission. If appellant had told the witness that he, appellant, had entered into the agreement as a matter of convenience in the handling of decedent's estate, and not intending a joint tenancy, this would unquestionably constitute an admission. What appellant actually told the witness, however, was that the decedent had said so. Ordinarily this type of statement would not be an admission; that is, a statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of them.

[4-6] On the other hand, it is equally well settled that there may be admissions other than statements made by the party himself; that is, statements of another may in some circumstances be treated as admissions of the party. The situations are (1) where the person who makes the statement is in privity with the party against whom it is offered, as in the case of agency, partnership, etc.; and (2) where the statement of the other is adopted by the

party as his own, either expressly or by conduct. Familiar examples of this second situation are the admissions by silence, where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission. See 2 Wigmore, Evidence, secs. 1052, 1069, 1071. It would seem that in the instant case, when appellant repeated the declaration of decedent without challenging it, it became an admission against him.

This is, however, the only testimony produced by respondent having any substantial tendency to prove an intent different from that expressed in the joint tenancy instruments. An attempt is made to corroborate it by proof of other declarations of appellant, and by the conduct of appellant. The declarations were made to respondent's officers and attorneys, and stated his belief that his uncle had not intended him to have any personal ownership of the property, but that the arrangement was intended solely for convenience of administration. Thus, Mr. Proudfit, of the law firm representing respondent, testified to a conference in his office shortly after Mr. Gaines' death, at which Mr. Smith, respondent's vice-president, explained the problems created by the joint tenancy agreements. Appellant said, according to the witness, "that he knew that his uncle had not intended that for himself individually, but that his uncle had not told him what he did have in his mind; that he felt that his uncle had intended that that money should be used for estate purposes. * *." Appellant was then told that if he wished to claim the property as his, "he would be in a very strong position". He answered that "he did not care at all about that because he knew the property was not intended for him; that he did not expect to assert any claim about it, and therefore, whatever his technical rights might be, it was of no consequence to him". The witness then testified to another conference a few days later at which he again raised the question of the possibility of conflicting interests of appellant and respondent, in view of the joint tenancy agreements, and again explained the case that could be made out in support of them. Appellant declared that "there could not be any doubt about it; that this money was not intended for him and he knew such to be the case". Similar testimony was given by Mr. Seaman and Mr. Smith. As to the conduct of appellant, it is pointed out that he did not treat the contents of the safe deposit box as his own, made no claim to the property therein or to its proceeds, and neither asserted nor exercised any rights in the bank accounts; and that after the death of decedent, he participated in numerous conferences and in the business of administration of the estate, always recognizing the property as that of the estate, and making no personal claim thereto until some five months after the death.

Although we have selected the strongest testimony the record offers in this connection, its essential weakness is apparent. With the exception of the statement of the decedent adopted by appellant, which has been discussed above, the declarations consist exclusively of speculations or impressions as to what his uncle had in mind, and legal conclusions of appellant as to his own rights. The evidence of the conduct of appellant is of the same character; he did not "feel" or believe that he had any claim, and therefore did not assert any. It may be observed that appellant testified that he was somewhat concerned about the possible effect of such a claim on his rights as a distributee under decedent's will, in view of the disinheritance clause therein. Regardless of motive, however, neither the declarations just recited nor the conduct of appellant can be said to add any particular strength to the admission discussed above.

The evidence regarding decedent's knowledge of the legal effect of his act in signing the joint tenancy agreements is uncontradicted. Miss Lapic, in the safe deposit department, testified that decedent asked for a safe deposit box, stating that he would like to have appellant sign the contract with him; that she inquired whether he wanted appellant to sign as agent, or whether he wanted a joint ownership contract; and that she then showed him the two different forms and he selected the joint ownership contract. She also testified that as a part of her regular routine duty she explained that under the latter form, upon death of one party the contents belonged to the survivor. Miss Noyes, a clerk handling new accounts, testified that decedent asked for the proper signature card to make his account a joint one with a nephew, and she gave him the proper card. Mr. Ralston, manager of the bank, testified that he asked decedent if he understood the difference between joint tenancy

with right of survivorship and an authority to draw checks on the account; and decedent replied that he did.

[7] This evidence is, of course, highly probative; and if the court had found in favor of appellant, the finding could not have been successfully challenged on appeal. Whether the opposite is true, that is, whether the present finding of the court has sufficient support in the single admission proved against appellant, and discussed above, is a difficult question. It is true that the determination of the intention of decedent from these conflicting statements was the task of the trial court; but it is almost incredible that decedent, a man of considerable business experience, if he did not intend a joint tenancy with right of survivorship, would deliberately choose the joint tenancy card in the face of the explanation given him by the bank employees. If it were necessary to our decision that we decide this point, we would hesitate before holding that proof of the deliberate choice of a writing expressing an intent to transfer property, with full knowledge of its nature and effect, could be overcome by a single statement attributed to decedent and suggesting an undefined purpose of "convenience" in "care" of decedent's estate. But regardless of the strength or weakness of the evidence, it cannot be considered at all unless it can meet the objection of the parol evidence rule.

[8-10] The parol evidence rule, as is now universally recognized, is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the "integration"), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations. See Civ. Code, sec. 1625; Code Civ.Proc., sec. 1856; Harding v. Robinson, 175 Cal. 534, 166 P. 808; Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329; Estes v. Delpech, 73 Cal.App. 643, 238 P. 1085; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 73 P.2d 1241; 5 Wigmore, Evidence, sec. 2400, p. 236; 3 Williston, Contracts, sec. 631; Restatement, Contracts, secs. 237-244.

[11] The theory of the trial court seems to have been that it was competent to introduce the evidence discussed above to show that though title passed to appellant under the joint tenancy agreement, it went to him in trust. The cases relied upon are those which hold that though a writing purports to make an absolute transfer, extrinsic evidence may be offered of a collateral agreement to hold the property as security, or in trust. See, Wigmore, supra, sec. 2437; Williston, supra, sec. 635. This exception to the parol evidence rule is, of course, well settled; and the evidence might be admissible under such a theory, if it established a collateral agreement on appellant's part to hold the property in trust. However the court's finding in general terms of such an agreement is not supported by the record. There is evidence of some vague kind of trust intent and a subject matter; but a specific trust purpose was entirely lacking. Respondent suggests that it might be a "dray" or "passive" trust, or one to convey. But there is no clear showing of an intention to create either of these types, nor was there a designated beneficiary. There is no indication as to what appellant would be required to do if he were held to be a trustee of the property. The record contains suggestions, mostly derived from appellant's own speculations, of an intention to have some payments made, or some things accomplished with the money; but no specific directions were given by decedent.

[12-14] The most that can possibly be inferred from the evidence is that the decedent may have intended to create a trust, for some purpose, or for someone's benefit, but failed to disclose that purpose, or the beneficiary, and therefore failed to create the trust. See, Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76, 96 A.L.R. 953; Wittfield v. Forster, 124 Cal. 418, 57 P.

219. Since the question is one of admissibility of the evidence, the proof of a trust must be clear and convincing before it could be deemed sufficient to overcome the legal effect of the joint tenancy agreements. Here it is wholly inadequate.

[15] The argument that appellant may be considered a constructive trustee simply begs the question. If an attempt were made to create a trust and the record showed the basic elements of intent, purpose, and subject matter, but it was unenforceable because of the statute of frauds or some other invalidating cause, the trustee could not keep the property individually, but would be declared a constructive trustee. This result, however, presupposes the establishment of the basic elements of a trust. Here the evidence is wholly insufficient to establish these elements, for the object or purpose of such a trust is entirely lacking. The record does not therefore support respondent's claim that the written transfer in joint tenancy was accompanied by and subject to a collateral trust agreement. The writing creating the joint tenancy remains the sole competent evidence of the agreement between the parties, and respondent's assumption of an unproved trust agreement as the basis for the further assumption of its breach, as ground for imposing a constructive trust, must necessarily fail.

It follows that the findings of the trial court cannot be sustained. The evidence clearly establishes that decedent, not acting under fraud or undue influence, and with full knowledge and understanding of the legal effect of his acts, made transfers of personal property to himself and appellant in joint tenancy. The writings effecting the transfers were clear and complete in their terms, and the record does not contain sufficient evidence to bring the case within any of the exceptions to the parol evidence rule.

[16] It therefore becomes unnecessary to give extended consideration to the provisions of section 15a of the California Bank Act. Deering's General Laws, Act 652. This statute provides that the making of a bank deposit in the form of a joint tenancy with right of survivorship shall be conclusive evidence of the intention of the depositors to vest title in the survivor. The agreement involved herein was made in the form contemplated by the statute, and in the absence of fraud or undue influence, which are recognized as exceptions under the statute, cannot be challenged by other evidence of intent. This statute applies, of course, only to the bank deposit. A question of some interest is raised by respondent as to whether subsequent fraud, consisting of a repudiation of a prior promise to hold the property in trust, may be fraud within the meaning of the statutory exception, on the analogy of cases involving the Statute of Frauds (see Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198), and the constructive trust cases. See Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430. Because the evidence does not show any fraud at all on the part of appellant, we deem it inappropriate to discuss the meaning and effect of the fraud exception to section 15a of the Bank Act.

The judgment is reversed.

We concur: WASTE, C.J.; CARTER, J.; EDMONDS, J.; SHENK, J.

CURTIS and HOUSER, Justices (dissenting).

We dissent. We are unable to agree with the conclusion reached by the majority opinion reversing the judgment in this case. The statement of the appellant, testified to by the witness, J. C. Seaman, as to the purpose of his uncle in executing the safe deposit card and the two joint tenancy bank accounts, was binding upon him, and was clearly admissible to show the intent of the uncle in executing said instruments. Fanning v. Green, 156 Cal. 279, 104 P. 308; Kyle v. Craig, 125 Cal. 107, 57 P. 791; Wharton on Evidence, secs. 482, 508, 955; Snow v. Paine, 114 Mass. 520, 526; Barnhart v. Fulkerth, 93 Cal. 497, 499, 29 P. 50. In the case of Kyle v. Craig, supra, 125 Cal. page 114, 57 P. page 794, it is stated that, "It is earnestly contended that the court erred in allowing Bright to testify, under the objections of defendant, as to his intentions when he executed the deed and transfers of property to defendant. We think the testimony was competent and material. The intentions and motives of Bright were the material matters being investigated. In such cases the universal rule is to receive the witness' testimony as to his intentions."

This evidence was sufficient to support the finding of the trial court that these documents were executed for the purpose of facilitating the settlement of the uncle's estate and not as executed gifts in favor

of appellant. It is true that this evidence is not undisputed but the trial court resolved the conflict therein in favor of the respondent. In addition to the above statement of appellant, his acts and conduct immediately subsequent to his uncle's death tended to show that his understanding of his uncle's intention in the execution of those documents was simply to facilitate the settlement of said estate. In our opinion the judgment of the trial court should be affirmed.




38 Cal.App.2d 250

## YOUNG v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 11241.

District Court of Appeal, First District, Division 1, California.

March 30, 1940.

**1. Workmen's compensation ⇐869**

The schedule which statute authorizes Industrial Accident Commission to prepare for determination of percentages of permanent disability should not be applied in a case where it does not even approximately cover disability involved. St.1937, p. 283, § 4660.

**2. Workmen's compensation ⇐1939**

Where jurisdiction of the Industrial Accident Commission to make any award depends upon the establishment of an ultimate fact, the reviewing court may examine evidence upon which finding of commission to that effect is based.

**3. Workmen's compensation ⇐1408**

To justify the upholding of an award of Industrial Accident Commission there must be sufficient competent evidence to support every jurisdictional fact essentially involved in application for compensation.

**4. Workmen's compensation ⇐1939**

Where findings of jurisdictional facts have been made by Industrial Accident Commission without any evidence to support them, award will be annulled.

**5. Workmen's compensation ⇐1644, 1939**

Where Industrial Accident Commission based its finding, that employee was 77 per cent. permanently disabled, on a schedule which did not purport to cover disability of employee although the positive, direct, and uncontradicted testimony of three medical witnesses, including insurer's examiner, was that employee was 100 per cent. permanently disabled, the schedule did not constitute "real and substantial conflict in evidence," nor even prima facie evidence in support of findings of Industrial Accident Commission, and award was required to be reversed as not authorized by evidence. St.1937, pp. 283, 301, §§ 4660, 5803–5805.

See Words and Phrases, Permanent Edition, for all other definitions of "Real and Substantial Conflict in Evidence".

**6. Workmen's compensation ⇐1698, 1703**

The practice of the Industrial Accident Commission, after compensation case has been closed, to submit medical evidence to its own rating department and to receive from that department a confidential report regarding degree of employee's disability, is improper, since neither employee nor insurance carrier are given opportunity to cross-examine expert in order to demonstrate that he applied wrong schedule to particular case or to show that there is no schedule applying to the particular injuries. St.1937, p. 283, § 4660.

**7. Workmen's compensation ⇐1409**

An award of workman's compensation must be based on "evidence", which means evidence legally and properly introduced.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

**8. Workmen's compensation ⇐1776**

The Industrial Accident Commission, as trier of facts in workman's compensation case, has no legal right to predicate its award upon the opinion of its own or any other expert when such opinion does not appear in record.

**9. Workmen's compensation ⇐1698, 1703**

In workman's compensation case, ability of injured employee to continue to compete in labor market and question of degree of pain suffered is subject of expert testimony which should be made part of record available to both sides, and the expert should be made available for cross-examination.

Proceeding in certiorari by E. Young, employee, against the Industrial Accident Commission of the State of California and the United States Fidelity & Guaranty Company to review and annul an award of the Industrial Accident Commission.

Award annulled and proceedings remanded with directions.

Edmund D. Leonard, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

KNIGHT, Justice.

Petitioner instituted this proceeding in certiorari to review and annul an award of the Industrial Accident Commission granting him compensation for injuries resulting from an industrial accident. The award was based on findings by the commission that petitioner's injuries caused permanent disability which the commission rated at 77 per cent; and petitioner claims that the uncontradicted evidence shows that he is unquestionably 100 per cent permanently disabled, and that therefore the commission acted in excess of its jurisdiction in rating him as only 77 per cent permanently disabled.

Petitioner at the time of the accident was 48 years old. He worked as a ranch laborer, having had no formal education, and on June 23, 1934, while employed by Haskins Brothers as a hay stacker, he fell some 20 feet, striking feet first, and sustaining fractures of both ankles and a fracture of the hip, as a result of which he was hospitalized five months and continued to receive treatment thereafter for more than two years. In the hospital he was placed in a cast for the hip and also for the ankles, and traction was used to pull the broken leg back in place. The left ankle healed without any permanent disability, and the hip healed, although with some distortion, restriction of motion, weakness and pain; however, the right ankle, although it healed to some extent, is still badly malformed. Numerous bones were fractured therein, and healed with considerable displacement and irregularity, which causes petitioner to suffer severe and constant pain therein, so much so that he cannot bear any weight on that foot without the greatest difficulty, and he uses a crutch to get about. It is the disability resulting from the condition of this ankle for which petitioner seeks 100 per cent permanent disability rating, claiming that he is totally unable to pursue the work for which he is fitted.

Upon application to the commission a hearing was had and evidence presented, and the commission on March 31, 1937, made its findings and award granting petitioner a permanent disability rating of 37¼ per cent, which entitled him to $15.39 a week for 149 weeks, less certain expenses. This finding was based upon the testimony and report of Dr. Victor W. Hart of Yreka. The report was dated January 28, 1937, and stated that petitioner's right leg was half an inch shorter than his left; that there was 30 degrees loss of flexion (bending) at the right hip joint, 10 degrees loss of abduction and 10 degrees loss of adduction in the right hip (movement toward and from the body), and 25 degrees loss of flexion in the right knee joint. As to the right ankle, he found that there was practically complete loss of lateral motion (from left to right), 80 per cent loss of passive dorsal and 70 per cent loss of passive plantar flexion (bending foot up or down at ankle), pain in the right hip and ankle on bending the ankle, some swelling of the foot and ankle, and some atrophy of the calf muscles of that leg. He concluded his report by stating that "The fixation at his ankle and bony atrophy and lack of motion of the small bones of his right foot make it utterly impossible for him to walk in an even approximate normal fashion or to carry on any occupation of the type for which he is fitted."

Thereafter and on January 31, 1939, (239 weeks after the injury) petitioner filed a petition to reopen the case under sections 5803–5805 of the Labor Code, St.1937, p. 301, and in support of his petition presented the report of Dr. James P. Warren of San Francisco. This report was dated January 19, 1939, and described practically the same loss of motion in the right hip, knee and ankle as Dr. Hart's report, and stated that "With the patient walking barefooted, he did so walking on the outer side of the foot; he was only able to take a few guarded steps without support, it being impossible for him to get around otherwise without the use of his crutch." The doctor concluded his report with the statement that petitioner "has limitation of motion of hip, knee, with nearly a stiff ankle. He is only able to get about slowly, with difficulty, and the use of a crutch. He is totally disabled from carrying on his previous oc-

cupation, and in view of the fact that there has been no change according to the patient's statement for a long period of time, the same I feel is permanent, and now ratable." Also before the commission at this hearing, which was held April 4, 1939, was the report of Dr. Frederick G. Linde, who had examined petitioner at request of the respondent insurance carrier, and Dr. Linde also testified at the hearing. He stated in his report, dated February 17, 1939, that "my examination coincides quite closely with both of these previous examiners (Drs. Hart and Warren) and feel that their conclusions are reasonable and essentially correct. Obviously the hip condition is no source of disability; at least not sufficient to prevent him from undertaking occupational activity. The ankle in its present condition is". He then went on to say that he disagreed with those doctors that nothing further could be done; and he suggested that the pain could be markedly decreased by an operation in which the removal of the cartilage would permit the ankle to become ankylosed (consolidated so as to make a stiff joint). In testifying at the hearing before the commission Dr. Linde stated that "it appeared to me that in his present condition he was entirely incapacitated, that is, regarding weight bearing certainly, by reason of the traumatic arthritis of the right ankle joint resulting from the fractures which he had, or the injury he had had involving the ankle joint"; and again he stated that he thought much of the disability could be removed by surgery on the ankle. Dr. Warren sent a further report dated March 27, 1939, in which he stated he had reviewed Dr. Linde's report and discussed the case with him, and "we both agree that this patient as he is at the present time, is totally permanently disabled", but he did not agree with Dr. Linde as to the advisability of an operation on the ankle for the reason that in his opinion it would offer only a 50-50 chance of improvement, and petitioner was not an especially good surgical risk, because the circulation in the leg was definitely impaired, and he had suffered ulcers of the lower leg. The other medical reports had also noted the scars of these ulcers, which petitioner testified he suffered in 1936. Petitioner stated that he did not think it advisable to attempt the operation, and Dr. W. H. Harrison, the assistant medical director of the commission, after an examination of petitioner, reported that he did not feel petitioner's refusal of surgery was unreasonable.

On June 30, 1939, the commission filed its order amending the findings and award, and rating petitioner's permanent disability at 77 per cent, and awarding him $15.39 a week for 240 weeks, and thereafter a life pension of $4.03 a week, less all amounts theretofore paid as disability indemnity and attorney's fees. (If petitioner were rated as 100 per cent permanently disabled, as he seeks, he would be entitled to $15.39 for 240 weeks, and thereafter to a life pension of $9.48.) In July, 1939, pending a petition for rehearing, petitioner was examined by Dr. R. W. Harbaugh, the medical director of the commission. He found much the same physical changes and loss of function as the other doctors, stating that there was considerable thickening through the ankle joint, no lateral motion of the joint, and petitioner bore his weight on the extreme external margin of the foot, using a crutch "rather agilely"; and he mentioned the considerable pain present; but he expressed no opinion as to the extent of the disability present. On August 29, 1939, the petition for rehearing was denied.

The disability ratings adopted by the commission were admittedly based solely on ratings given in the "Schedule for rating permanent disability", and it appears from the reports of the permanent rating department, which are filed as a supplemental return, and also in the brief filed by respondents as a memorandum to the supplemental return, that the original rating of 37¼ per cent was based on the schedule rating for "complete immobility of ankle joints, both feet", calling for a rating of 32.1 per cent, to which 5 per cent was added for the shortening of the leg; and the final rating of 77 per cent was based on the schedule rating for "failure of hip to unite (false joint) one hip". The respondents take the position that this schedule constituted prima facie evidence under section 4660 of the Labor Code, St.1937, p. 283, and supports the award made; that "as triers of the fact, the Commission had the undoubted right to adopt either the rating called for by the tables or the opinions of these doctors. Their decision being supported by at least prima facie evidence should not be subject to annulment". In support of their position respondents rely upon the rule that the extent of disability occasioned by an injury is rarely, if ever, capable of exact measurement, and the determination of the percentage of disability is therefore left to the sound discretion of the commission, to be exercised in view of all of the circum-

stances; and its conclusion on this matter is the determination of a question of fact not subject to review by the courts unless palpably contrary to the undisputed evidence. 27 Cal.Jur., p. 506; Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150; Globe Mills v. Industrial Accident Comm., 64 Cal.App. 307, 221 P. 658; Ford Motor Co. v. Industrial Accident Comm., 202 Cal. 459, 261 P. 466; Hines v. Industrial Accident Comm., 215 Cal. 177, 8 P.2d 1021.

The position so taken by the commission would no doubt be sustainable if the schedule had covered the particular disability involved. But it is obvious that the ratings were not based on the disability here existing, nor was there any rating in the schedule which covered petitioner's disability. He did not have "complete immobility of ankle joints, both feet" nor a "failure of hip joint to unite (false joint) one hip". He was suffering from a badly malformed ankle, with many ragged and uneven bone surfaces, which if he placed his weight thereon caused him such severe pain that in order to get about at all he had to use a crutch to relieve the weight. The schedule itself sets out that "The list of disabilities given is not intended to be complete. Where the injury consists of a combination of losses or a disability not enumerated the case must be referred to the Commission for rating." And the section of the Labor Code authorizing the use of the schedule (sec. 4660) provides: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market. The commission may prepare, adopt, and from time to time amend, a schedule for the determination of the percentages of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

[1] It is apparent, therefore, from the above provisions of the Labor Code and the schedule itself, that it was not intended that it should be applied in a case such as this, where it did not even approximately cover the disability involved.

[2-4] It is well settled that when the jurisdiction of the commission to make any award depends upon the establishment of an ultimate fact, the reviewing court may examine the evidence upon which the finding of the commission to that effect is based. In such a case, to justify the upholding of an award there must be sufficient competent evidence to support every jurisdictional fact essentially involved in the application for compensation. And where such findings have been made without any evidence to support them, the award will, of course, be annulled. See cases cited in 27 Cal.Jur. p. 576.

[5] In the present case, an examination of the record shows that the commission based its findings that petitioner was 77 per cent permanently disabled upon a schedule, limited by its terms to the injuries specified therein, which does not purport to cover the disability here involved, although the positive, direct, uncontradicted testimony of the three medical witnesses, one of whom was the insurance carrier's own examiner, was that petitioner was 100 per cent permanently disabled from doing the work for which he was fitted. In that situation we are of the opinion that the schedule does not constitute in the present case such a "real and substantial conflict in the evidence to render the findings of the commission immune to inquiry by [this] court" (Hubbert v. Industrial Accident Comm., 14 Cal.App.2d 171, 58 P.2d 171, 172; Gamberg v. Industrial Accident Comm., 138 Cal.App. 424, 32 P.2d 413; Thoreau v. Industrial Accident Comm., 120 Cal.App. 67, 7 P.2d 767), nor even prima facie evidence in support of the commission's findings; and that therefore such findings are "palpably contrary to the undisputed evidence".

For the reasons stated, the award is annulled, and the proceeding remanded for further proceedings not inconsistent with the views herein expressed.

PETERS, Presiding Justice (concurring).

I concur with everything stated in the main opinion.

[6-8] As that opinion points out, the uncontradicted medical testimony in this case is to the effect that the employee is 100 per cent disabled. The commission seeks to support its 77 per cent rating by reference to a certain "Schedule for Rating

Permanent Disabilities", and by a supplemental return containing certain confidential reports of the Permanent Disability Rating Department of the commission. On March 17, 1937, this department reported that the rating was 37¼ per cent; on May 7, 1937, it reported no change in its opinion; on May 11, 1939, it reported that the permanent disability rating was 77 per cent; and on July 18, 1939, in an interoffice communication, this department gave as its opinion that the rating should be 91 per cent or 100 per cent. All of these reports described the injury in substantially the same manner, and all purport to be based on ratings contained in the "Schedule for Rating Permanent Disabilities". It is conceded that these reports were not made available to counsel on either side of this case. At the oral argument it was disclosed that it is the practice of the respondent commission, after a case is closed, to submit the medical evidence to its own rating department, and to receive from that department a confidential report as to the degree of disability of the employee. In the present case, the award was based on the confidential report of May 11, 1939. Such practice cannot be approved. Neither the employee nor the carrier are given an opportunity to cross-examine the expert in order to demonstrate that he applied the wrong schedule to the particular case, or to show, as in the present case, that there is no schedule applying to the particular injury. The award must be based on evidence, and that means evidence legally and properly introduced. The commission, as trier of the fact, has no legal right to predicate its award upon the opinion of its own or any other expert, when such opinion does not appear in the record.

[9] This problem is not a simple one of computation. The fact that the expert of the commission, at different times, has rated this particular injury in three or four different ways, demonstrates this. Obviously, no schedule can apply to every possible injury. No schedule can take into consideration the degree of pain, the ability of the injured man to continue to compete in the labor market, and other possible factors. This is the subject of expert testimony. This testimony should be made part of the record, available to both sides, and the expert should be made available for cross-examination. Confidential, secret opinion should play no part in the making of any award.

I concur: WARD, J.

37 Cal.App.2d 720

**MEYER v. THOMAS et al.**

**Civ. 11070.**

District Court of Appeal, First District. Division 1, California.

April 12, 1940.

Hearing Denied May 9, 1940.

**Husband and wife ⇐268(9)**

**Community property, fraudulently acquired by wife acting as husband's agent, is liable for amount of previous owner's money judgment against wife for damages because of her tort.**

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 100 P.2d 360.

John F. O'Sullivan, of San Francisco, for appellants.

Arthur J. Healy, William E. Barden, and Frank J. Needles, all of San Francisco, for respondent.

PER CURIAM.

On this petition it is urged that in its opinion this court has disregarded the rule of Hilborn v. Bonney, 28 Cal.App. 789, 154 P. 26, and Gray v. Gray, 25 Cal. App.2d 484, 77 P.2d 908, to the effect that when one has been deprived of his property by the fraud of another he may recover the property or sue for damages, and if he pursues the latter remedy he validates the acquisition of the property and becomes only a general creditor of the fraudulent defendant. We may assume, for the purposes of this opinion, that that rule is applicable, and that by electing to take a money judgment in the first action the plaintiff cut off the right to have the specific property returned to him and became a general creditor of Elizabeth Thomas. Then the legal situation is one where the plaintiff has a judgment against Elizabeth Thomas based on her tort. The property, we may assume, has become the community property of Elizabeth Thomas and her husband. The question then presented is whether any of the community property, including the property fraudulently acquired, is liable for that judgment, and whether fraudulent conveyances in reference thereto should be set aside.

The question presented on this appeal, therefore, was whether or not the husband, who is a party to this action, had participated in the tort of his wife. If so, of course, the community property is liable for their tort. On the evidence produced the opinion holds the wife was acting as the agent of the husband, and, therefore, under the decision in Hulsman v. Ireland, 205 Cal. 345, 270 P. 948, and the other cases cited in the opinion, the community property is liable.

There is nothing in the two cases relied upon by petitioner which conflicts with the views herein expressed.

The petition for rehearing is denied.




38 Cal.App.2d 270

## DAVIS WELDING & MFG. CO. v. ADVANCE AUTO BODY WORKS, Inc. (AMERICAN PIPE & STEEL CORPORATION, LIMITED, Intervener).

Civ. 11340.

District Court of Appeal, First District, Division 2, California.

April 2, 1940.

Hearing Denied May 31, 1940.

**1. Appeal and error ⇐1041(4)**

In action upon written contract wherein contemporaneous oral contract was proved and plaintiff's liability to defendant established, any error in trial court's allowing intervener to amend pleadings so as to conform to proof by making his case rest upon modified written contract rather than the oral contract was not prejudicial to plaintiff where even without the amendment intervener could have recovered on the oral contract by way of subrogation to defendant's rights or on the theory oral contract was expressly made for his benefit. Civ. Code, § 1559.

**2. Reformation of instruments ⇐45(2)**

In action upon written contracts wherein contemporaneous oral contract establishing liability of plaintiff was relied on by defendant who counterclaimed and by intervener, evidence sustained judgment for intervener on ground that the oral agreement existed and was intended by all parties to be a part of the written contracts, that its terms were omitted from the written contracts by mutual mistake, and that its terms were a substantial part of the consideration inducing defendant and intervener to execute the written contracts.

**3. Limitation of actions ⇐96(2)**

In action upon written contract, intervener's amended complaint filed July 23, 1935, setting up modified written contract incorporating oral agreement alleged to have been omitted from written contract by mutual mistake of the parties was within statute of limitation period where mistake was not discovered before action was commenced December 14, 1934, and probably was not discovered until plaintiff's denial of defendant's pleadings, filed April 3, 1935, setting up the oral contract. Code Civ.Proc. § 338.

**4. Limitation of actions ⇐96(2)**

Rules relating to the computation of the statute of limitation period from the discovery of fraud apply as well to the discovery of mistake. Code Civ.Proc. § 338.

**5. Appeal and error ⇐1071(5)**

Any inconsistencies in court's findings upon immaterial matters were of no consequence where findings made clearly covered the ultimate facts upon which judgment was based.

**6. Evidence ⇐442(1)**

In action upon written contract, evidence of a contemporaneous oral agreement covering a matter upon which the writing was silent and not inconsistent with the terms of the writing was admissible.

**7. Reformation of instruments ⇐44**

In action upon written contract, evidence of contemporaneous oral agreement was admissible on plea for reformation of the written contract so as to incorporate the oral agreement on ground the oral agreement was omitted by mutual mistake.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit upon an open book account and for an accounting by the Davis Welding & Manufacturing Company against the Advance Auto Body Works, Inc., wherein defendant filed a counterclaim and a cross-complaint, and the American Pipe & Steel Corporation, Limited, intervened. From

judgment for intervener for $1,788.28, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Bicksler, Parke & Catlin, Frank D. Catlin, and William E. Woodroof, all of Los Angeles, for appellant.

Courtney Lacey, of Los Angeles, for respondent Advance Auto Body Works, Inc.

Russell Graham, of Los Angeles, for intervener and respondent American Pipe and Steel Corporation, Ltd.

NOURSE, Presiding Justice.

Plaintiff sued upon an open book account and for an accounting. Defendant answered, pleading a written contract of June 30, 1930, and also a contemporaneous oral agreement by which plaintiff agreed that, if defendant would pay for and take delivery from plaintiff of certain equipment which the defendant would be required to purchase to enable it to perform the contract, then, upon the termination of the written contract, plaintiff would repurchase such and other like equipment left on defendant's hands. Defendant also filed a counterclaim and a cross-complaint for the value of equipment left on hand when the parties abandoned the written contract. Plaintiff's answer to the cross-complaint admitted the written contract but denied the material allegations relating to the alleged oral contract. The intervener above named filed its complaint in intervention setting up a written contract between defendant and intervener, dated July 2, 1930, which expressly incorporated the contract of plaintiff and defendant, and pleading that, at the time of the execution of the contract of July 2, it was represented to intervener "by plaintiff and defendant" that they had executed the oral contract referred to in defendant's pleading. Intervener further alleged that, in reliance upon these representations and promises, he was induced to enter into said written contract with defendant and to advance defendant $2,653.51 to be used by defendant in purchasing equipment under the terms of the written contract of June 30, 1930, and that the contract of July 2 would not have been made by intervener without plaintiff's assurances as to the oral contract.

At the trial by the court without a jury the parties stipulated that the claim upon the open book account was correct and the sum sued for was owed by defendant to plaintiff. Thereupon plaintiff waived and abandoned the second cause of action—for an accounting under the contract of June 30, 1930—and the cause went to trial on the cross-complaint of defendant, the complaint in intervention, and the answers of plaintiff. The intervener had judgment for $1,788.28, the value of the equipment on hand when the written contract was abandoned less what had been returned to plaintiff and paid for by it pursuant to the terms of the oral contract. The plaintiff appealed, and the intervener assumes the position of a respondent.

[1] The gist of the action is plaintiff's oral agreement to repurchase the parts and equipment upon the termination of the written contract. The existence of such an oral agreement cannot be doubted in view of the convincing testimony of all the parties to the agreement, who were called as witnesses. At the close of the trial the court directed the intervener to request leave to amend the pleadings to conform to the proof—thus to make intervener's case rest upon a modified written contract calling upon plaintiff to repurchase their parts rather than upon an oral agreement, which was contemporaneous with the written contract, and which called upon the plaintiff to do the same thing. The modification was based upon the theory of mutual mistake of the parties when the contracts were executed and upon the evidence of the intention of the parties that the terms of the oral agreement should become incorporated into the written contracts. The appellant cries "error", but we are unable to perceive it. The execution of the oral contract having been practically conceded through the weaknesses of the testimony purporting to deny it, the real question before the trial court was the amount which the appellant should pay under its obligation. If this oral contract was still enforceable the question of the form which the pleadings should have assumed is immaterial since the appellant has not suggested any possible prejudice to it. We cannot find that any of the claimed errors arising out of the amendments to intervener's pleadings has caused any prejudice to appellant. Hence, if we may assume that the trial court was in error in permitting intervener to amend the pleadings to seek a reformation of the written contract because of mutual mistake instead of requiring him to rest on the oral agreement, the appellant was not prejudiced. If no amendment had been al-

lowed, the respondent would have been entitled to recover on the oral agreement by way of subrogation to the rights of defendant, or upon the theory that the oral contract was expressly made for the benefit of a third person—the intervener. Sec. 1559, Civ. Code.

To recapitulate—before the written contract between plaintiff and defendant was signed, defendant insisted upon plaintiff agreeing to repurchase the equipment upon cancellation of the written contract. Plaintiff demurred because of the delay in sending the contract to the home office. The oral agreement was then made. Before the written contract between defendant and intervener was signed the plaintiff reaffirmed this oral agreement to both defendant and intervener. The equipment was delivered to defendant by intervener on this express understanding—that plaintiff would repurchase it upon cancellation of the original contract. Thereupon plaintiff obtained over a period of two years all the benefits of the contract with defendant—benefits which would not have accrued except for intervener's contributions, all of which were made contingent upon the oral contract. When the amendments to the pleadings were allowed the plaintiff was given ample opportunity to meet the new pleadings and does not now contend that any advantage was taken in this respect.

[2] The trial court found that the terms of the oral agreement above noted were intended by all three parties to be incorporated into and become a material part of the written agreements, that the omission of such terms from the writing was a mutual mistake, that these terms were a substantial part of the consideration which induced defendant and intervener to execute the written contracts, and that neither would have executed either of the written contracts except upon such understanding. There is ample evidence to support these findings. Appellant's attack upon them is based upon the narrow ground that there is insufficient direct evidence of "mutual mistake", but this is the logical and reasonable inference to be drawn from all the circumstances.

[3, 4] On the issue of the statute of limitations the trial court found that continuously from plaintiff's cancellation of the contract in September, 1932, to the filing of its complaint in December, 1934, negotiations were conducted for the return of the equipment to plaintiff, that some equipment of several hundred dollars value was returned and accepted by plaintiff, and that defendant relied upon said promises and had no reason to believe that plaintiff would not accept and pay for the equipment left in defendant's and intervener's possession until this suit was filed. The complaint was filed December 14, 1934. In the second cause of action plaintiff pleaded the written contract of June 30, 1930, and sought an accounting under it. The answer and counterclaim and the cross-complaint, pleading the contemporaneous oral agreement, was filed April 3, 1935. The complaint in intervention was filed July 23, 1935. Though neither party has directed our attention to any direct evidence disclosing the date of discovery of the mistake, it is a reasonable inference from the facts above stated that such discovery was not made until the original complaint was filed herein, or more probably when plaintiff in its answer denied the allegations of the cross-complaint pleading the oral agreement. In either case the amended pleadings were well within the period of the statute of limitations as this does not begin to run until the fraud or mistake has been discovered. Code Civ.Proc. § 338; Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243; 16 Cal.Jur., p. 499; 17 R.C.L., p. 856. And these rules relating to the computation of the period from the discovery of the fraud apply as well to the discovery of mistake. 16 Cal. Jur., p. 505.

[5] The material findings upon which the judgment rests are that, from the beginning of the transactions, all parties assumed, intended, and understood that the terms of the oral agreement should be incorporated in and become a part of the writing, that plaintiff accepted these terms and enjoyed the benefits. The judgment merely charges it with the burdens. Hence, whatever inconsistencies there may be in the findings upon immaterial matters are of no consequence so long as the findings made clearly cover the ultimate facts showing that the obligation of plaintiff was valid and enforceable.

[6, 7] Appellant complains of the rulings of the trial court in admitting evidence of the "contemporaneous oral agreement", which evidence thereafter was relied upon to prove the mutual mistake of the parties. The ruling of the trial court was sound. The evidence was admissible

to prove the oral contract since it covered a matter upon which the writing was silent and since it was not inconsistent with the terms of the writing. Buckner v. A. Leon & Co., 204 Cal. 225, 227, 267 P. 693; 10 Cal.Jur., p. 927. As applied to the issue of mutual mistake and the plea for reformation it was likewise admissible. 10 Cal. Jur., p. 936.

Other arguments of appellant do not call for comment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.




38 Cal.App.2d 309

**BAUER v. BAUER et al.**

**Civ. 11339.**

District Court of Appeal, First District, Division 2, California.

April 4, 1940.

Rehearing Denied May 4, 1940.

See 101 P.2d 1117.

**1. Quieting title ⇐10(2)**

Plaintiff, claiming that she was owner of legal and equitable title to bonds by virtue of an unconditional gift from father and that bonds had been registered in name of plaintiff's brother as trustee for plaintiff merely for protection against claims of creditors of plaintiff's divorced husband, could maintain action to quiet title against adverse claim of her brother.

**2. Gifts ⇐49(6)**

In action to quiet title to bonds, evidence sustained finding that plaintiff's father made unconditional gift of bonds to plaintiff and that bonds were registered in name of defendant, plaintiff's brother, for purpose only of protecting plaintiff from harassment by creditors of her divorced husband.

**3. Quieting title ⇐10(2)**

The rule that an action to quiet title will not lie in favor of the holder of an equitable title as against owner of the legal title is inapplicable where the plaintiff in quiet title action claims and the trial court finds that no trust was created, and that the plaintiff was owner of both legal and equitable title.

**4. Gifts ⇐49(6)**

Where plaintiff, seeking to quiet title to bonds, claimed under an unconditional gift from her father, mere fact that bonds were registered in name of defendant, plaintiff's brother, under the designation of "trustee", did not conclusively show that a trust had been created or that legal title had passed to defendant.

**5. Gifts ⇐48**

Where plaintiff claiming under unconditional gift from father sought to quiet title to bonds against adverse claim of defendant, plaintiff's brother, in whose name the bonds had been registered under designation of "trustee," evidence was admissible for purpose of showing that the registration was not intended to create trust or pass legal title to defendant.

**6. Interest ⇐66**

Where, after plaintiff had instituted action to quiet title to bonds, the bonds were called as of May 1, 1936, but defendant prevented plaintiff from obtaining proceeds of bonds following the calling thereof by refusing to release his alleged claim on bonds, trial court properly included in judgment provision for recovery of interest from time of calling of bonds, notwithstanding no claim for interest or for money judgment was made in the complaint.

**7. Equity ⇐39(1)**

Once a court of equity has obtained jurisdiction of a cause, it will dispose of the entire controversy and grant complete relief in order to avoid a multiplicity of actions.

---

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by A. R. Bauer against O. W. Bauer and others to quiet title to twenty-three bonds, wherein the named defendant filed a cross-complaint making William C. Jensen a cross-defendant. S. A. Best also filed a cross-complaint. Judgment for plaintiff, and O. W. Bauer appeals.

Affirmed.

William J. O'Brien and John F. Poole, both of Los Angeles, for appellant.

William C. Jensen, of Los Angeles, for respondent.

Clyde C. Triplett, of Los Angeles, for defendant S. A. Best.

SPENCE, Justice.

Plaintiff sought to quiet title to twenty-three bonds issued by the Southern California Telephone Company. Defendant O. W. Bauer, who is the brother of plaintiff and will be hereinafter referred to as the defendant, filed his answer and cross-complaint, denying the material allegations of the complaint and alleging that in 1919, the father of plaintiff and defendant created a trust with respect to said bonds and transferred them to said defendant as trustee. He alleged that said bonds were in the possession of William C. Jensen, who was made a cross-defendant. He therefore prayed that plaintiff take nothing by her action and that it be ordered that said bonds be delivered to him as trustee for the purposes of the trust. Defendant S. A. Best filed his answer and cross-complaint, claiming an interest in said bonds by reason of certain dealings with plaintiff. The trial resulted in judgment in favor of plaintiff and against defendant and from said judgment, defendant appeals.

It appears that the transaction giving rise to this litigation occurred in 1919. Some years prior thereto, plaintiff had married one Kitts, but, prior to 1919, these parties had been divorced. The father found that plaintiff was in financial difficulties and he testified that he decided to help her "by giving her bonds enough to keep her in good circumstances and I also bought a house for her for a home". There is some conflict in the evidence regarding the exact nature of the bond transaction in 1919. It is admitted by all that the bonds were delivered to plaintiff by her father at that time and that they remained in her possession, or the possession of those claiming under her, ever since that time. It is further admitted by all that while said parties caused said bonds to be registered in the name of "O. W. Bauer, trustee for Alice R. Kitts", said defendant never had possession of said bonds or collected the maturing interest coupons during the seventeen years intervening between 1919 and the time of the trial. Plaintiff, defendant and the father testified regarding the conversations had by the parties in 1919. It was plaintiff's theory and her testimony tended to show that it was the father's intention to make an unconditional gift of said bonds to plaintiff and that he delivered them to plaintiff for that purpose; that the parties discussed the desirability of protecting said bonds from any possible claims made by creditors of her divorced husband and decided to register the bonds as above indicated but without any intention of creating a trust. There was ample testimony given by plaintiff to sustain this theory and there was further support for this theory in the testimony relating to the acts and declarations of the parties during the seventeen years which followed. It was defendant's theory, on the other hand, that a trust had been created. Defendant and the father gave testimony concerning the terms of this alleged trust, but it is significant to note that their testimony is not entirely in accord concerning these terms.

The trial court's findings sustained plaintiff's theory. It found that plaintiff was the owner of the bonds; that the father "made a gift" of said bonds to plaintiff in 1919 at which time said bonds "were delivered unconditionally to plaintiff"; that about said time, plaintiff caused said bonds to be registered as above set forth but that no trust was created or intended by the parties or any of them; that it was not intended by said parties that such registration should have any legal effect or that said defendant should act "in any capacity other than as mere agent and dummy for plaintiff"; that there were creditors of plaintiff's former husband, none of whom were creditors of plaintiff, and said bonds were caused to be registered in defendant's name "for the purpose only of protecting plaintiff and her property from harassment by the creditors of her said former husband"; that the acts performed in registering said bonds as above set forth "were a fiction and a sham" done only for the purpose above stated which was at all times known to all of said parties.

The trial court's conclusions and judgment were in accord with the findings. It was ordered, adjudged and decreed that defendant O. W. Bauer had not "either in his individual or in his claimed representative capacity as trustee" any right, title or interest in said bonds; that plaintiff's title be quieted against said defendant "both individually and as such claimed trustee"; that said defendant had never been trustee and that no trust had ever been created with respect to said bonds; and that said

defendant be directed and ordered to execute and deliver to plaintiff proper endorsements and transfers of said bonds within ten days after the signing of the judgment.

[1-5] Practically all of defendant's contentions on this appeal are based upon the assumption that a trust had been created and upon the claim that the evidence was insufficient to support the trial court's findings to the effect that there had been an unconditional gift of the bonds to plaintiff free of any trust. We find no merit in these contentions. It was plaintiff's claim that no trust had been created and she therefore brought this action against defendant individually. The claim that a trust had been created was raised by the allegations of said defendant's answer and cross-complaint. Plaintiff never claimed or admitted that a trust had been created. On the contrary, plaintiff claimed that she was the owner of the legal and equitable title to the bonds by virtue of said unconditional gift and she sought to quiet her title against the adverse claim of said defendant. This was entirely proper and the trial court found in accordance with plaintiff's claims upon evidence which in our opinion was sufficient to support the findings. Defendant cites and relies upon Buchner v. Malloy, 155 Cal. 253, at page 255, 100 P. 687, at page 688, where the court said, "That an action to quiet title will not lie in favor of the holder of an equitable title as against the owner of the legal title is a proposition settled by repeated decisions of this court." But this rule can have no application where the plaintiff in such quiet title action claims and the trial court finds that no trust was created and that the plaintiff was the owner of both the legal and equitable title. The mere fact that the bonds were registered by the parties in the name of defendant under the designation of "trustee" did not conclusively show that a trust had been created or that the legal title had passed to defendant. Other evidence was introduced to show that such registration was not intended to have any such effect and such evidence was properly admitted for that purpose. P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820; Texas Company v. Berry Garage, 121 Cal. App. 455, 9 P.2d 241. Defendant points to certain testimony of plaintiff in which she used the word "trustee" but we believe that a reading of the entire testimony shows that she used said word merely with reference to the admitted designation of defendant as trustee in the registration and not in its technical, legal sense.

[6, 7] One further contention raised by defendant requires consideration. The trial was had and the judgment was entered in 1936. The bonds in question were called as of May 1, 1936. The trial court, after ordering the endorsement and transfer of the bonds by defendant, adjudged that "from and after May 1, 1936, and until such time as defendant and cross-complainant fully and completely complies with said provisions of this decree, plaintiff shall have and recover from said defendant and cross-complainant interest at the rate of seven per cent per annum upon the sum of twenty-three thousand ($23,000.00) dollars". Defendant contends that the trial court erred in entering judgment requiring the payment of interest as indicated but we find no merit in this contention. It is true, as pointed out by defendant, that no claim for interest or for a money judgment was made in the complaint. Said complaint was filed prior to May 1, 1936, and the bonds had not then been called. The judgment was entered after May 1, 1936, and after the bonds had been called. Defendant admittedly refused to release his alleged claim upon said bonds and he thereby prevented plaintiff from obtaining the proceeds of said bonds following the calling thereof. We believe it was entirely proper for the trial court to include in the judgment the above-mentioned provision for the recovery of interest from the time of the calling of said bonds. Such provision was necessary in order to afford complete relief to plaintiff and it is a well-settled rule that once a court of equity has obtained jurisdiction of a cause, it will dispose of the entire controversy and grant complete relief in order to avoid a multiplicity of actions. 10 Cal.Jur. 496, sec. 41.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

38 Cal.App.2d 154

## JUNGE v. MIDLAND COUNTIES PUBLIC SERVICE CORPORATION et al.

(two cases).

Civ. 12352.

District Court of Appeal, Second District, Division 2, California,

March 25, 1940.

Rehearing Denied April 15, 1940.

Hearing Denied May 23, 1940.

**1. Electricity ⇐19(5)**

Evidence *held* to authorize recovery from power company and its employee for burns suffered by boy from electricity from fallen power wire, on ground of negligence in reclosing automatic switch a second time when it had opened by operation of circuit breaker.

**2. Appeal and error ⇐1056(1)**

In action against power company and its employee for injuries from burns caused by electricity from fallen wire, on ground of negligence in closing automatic switch twice, exclusion of evidence that employee was acting in accordance with practice of the best-managed concerns was not prejudicial error, where witnesses testified concerning practice of two concededly well-managed companies, and such testimony indicated that reclosing a second time was contrary to the best practice.

**3. Electricity ⇐19(13)**

In action against power company and its employee for burns caused by electricity from fallen wire, instruction that if plaintiff was injured by coming in contact with electricity without knowledge of danger therefrom, such fact, in absence of explanation by defendants, afforded reasonable evidence of want of care and it then devolved upon the defendants to show that injuries did not occur from negligence, was not erroneous as shifting to defendants the burden of proving lack of negligence.

**4. Trial ⇐260(8)**

The giving of an instruction on the doctrine of res ipsa loquitur, even though such doctrine is inapplicable, is not prejudicial error, where the jury has been properly instructed that plaintiff has burden of proving by preponderance of evidence that defendants' negligence is proximate cause of injury, and there is substantial evidence of negligence.

**5. Appeal and error ⇐1004(1)**

A verdict will not be set aside upon appeal on ground that damages are excessive, unless verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice, or corruption.

**6. Damages ⇐130(1)**

$35,000 for severe burns on face and body of 13 year old boy from high-voltage electricity, and $10,000 to boy's father, including $6,532 for medical expenses and $3,468 for loss of services for 2½ years, *held* not so excessive as to suggest passion, prejudice, or corruption.

---

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Warren Junge, a minor, by John L. Junge, his guardian ad litem, and by John L. Junge, against the Midland Counties Public Service Corporation and others for personal injuries and for consequential damages resulting from burns caused by electricity, allegedly because of defendants' negligence. From a judgment on a verdict for plaintiffs, defendants appeal.

Affirmed.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, and F. H. Pearson, of Fresno, for appellants.

Glikbarg, Wolf & Selig, of San Francisco, and A. H. Brazil, of San Luis Obispo, for respondents.

McCOMB, Justice.

From a judgment in favor of (a) plaintiff Warren Junge in the sum of $35,000 and (b) plaintiff John L. Junge, father of Warren Junge, in the sum of $10,000, after trial before a jury in an action to recover damages for personal injuries resulting from defendants' negligence, defendants appeal.

Viewing the evidence most favorable to plaintiffs (respondents), the essential facts are:

August 15, 1937, plaintiff Warren Junge, age 13 and his mother, who were living on a farm in San Luis Obispo county, arose about 6 a. m. Said plaintiff's mother found that there was no electricity in her home, whereupon she and her son left their house, climbed through a barbed wire fence and started to milk their cows. After four or

five cows had been milked, they noticed that one of the power wires which came to their premises from the main transmission line had fallen and was lying across the wire fence through which they had climbed. They completed the milking of the cows, returned to their house and found that they were still without electricity. Plaintiff Warren Junge then telephoned to defendant McKie, the service man for defendant Midland Counties Public Service Corporation. Plaintiff Warren Junge and his mother again went outside and commenced picking carrots, at which time they noticed a grass fire along the wire fence. Plaintiff Warren Junge attempted to put out the fire while his mother went into their home to call assistance. While engaged in attempting to extinguish the fire, plaintiff Warren Junge came into contact either with the fallen wire or the fence which had become energized by the fallen wire, which was one of two high voltage wires located on a pole situated on the premises on which plaintiff Warren Junge lived and which conveyed 11,000 volts of electricity. As a result he was rendered unconscious and severely burned.

Defendant McKie at 6:30 a. m. learning that the electricity was off on the circuit which supplied the residence in which plaintiff Warren Junge lived, left his home and traveled by automobile a distance of eight miles to a regulator station where at 7:10 a. m. he found the automatic switch upon the circuit open, which he immediately closed and which switch, through action of the automatic circuit breaker, reopened at 7:11 a. m. At 7:13 a. m. he reclosed the switch, energizing the circuit with 11,000 volts of electricity. At 7:14 a. m. the switch again opened.

Defendants rely for reversal of the judgment on these propositions:

*First: There is no substantial evidence to sustain a finding that defendants were in any way negligent.*

*Second: The trial court committed prejudicial error in excluding evidence that defendant McKie on closing the automatic switch twice was acting in accordance with the practice of the best managed concerns in the industry.*

*Third: The trial court committed prejudicial error in instructing the jury as follows: "If you believe from the evidence that Warren Junge was injured by coming in contact with high voltage electricity without knowledge of the danger therefrom, the electric current for which was furnished by defendants, such fact, in the absence of explanation by the defendants, affords reasonable evidence of defendants' want of care and it then devolves upon defendants to show that the injuries resulting to Warren Junge from said electricity did not occur from any negligent act or acts on their part."*

*Fourth: The verdicts in favor of (a) plaintiff Warren Junge in the sum of $35,000 and (b) John L. Junge in the sum of $10,000 are excessive.*

The first proposition is untenable. The evidence disclosed that:

(a) At the time Mrs. Junge arose there was no electricity flowing into her home.

(b) At the time Mrs. Junge and her son finished milking the cows and climbed back through the wire fence and went into the house the grass had not as yet become ignited.

(c) At 7:10 a. m. defendant McKie closed the automatic switch which had opened, indicating there was trouble on the 11,000 volt electric circuit, a portion of which transversed the Junge premises. At 7:11 a. m. the switch reopened through the action of the automatic circuit breaker and at 7:13 said defendant reclosed the switch. At 7:14 the switch again opened.

(d) On leaving her home for the second time to pick carrots Mrs. Junge noticed that grass fires had started on her premises.

(e) Plaintiff Warren Junge, while endeavoring to put out the fires that had started was severely burned by coming in contact with either the wire fence or the fallen wire which had been energized by electricity.

(f) Witness Boyles, assistant manager of operations of the Southern California Edison Company, called on behalf of defendant, testified relative to the practice of his company on closing automatic switches which had opened: "On our system on the 2300 to 4000 volt circuit we reclose twice; *on 11,000 and 16,000 we reclose once.*" (Italics added.)

[1] From the foregoing facts the jury were justified in finding that the high voltage wire had fallen before plaintiff Warren Junge and his mother first left their home on the morning of August 15, 1937 (fact [a], supra), that the reclosing of the automatic switch by defendant McKie caused the grass to catch on fire (facts [b] and [c], supra), that after the first

closing of the switch causing the fire and before its closing the second time by defendant McKie, plaintiff Warren Junge started to put out the grass fire (facts [c] and [d], supra), and that it was negligent for defendant McKie to close the automatic switch the second time, since so doing was contrary to the practice of the best managed companies in the industry (facts [e] and [f], supra).

[2] The second proposition is likewise untenable. Witness Boyles, who was assistant manager of operations of the Southern California Edison Company was permitted to testify as to the practice of the Southern California Edison Company relative to the reclosing of automatic switches when opened by some interruption on the electric circuits. The witness Plummer also testified as to the practice of the Modesto Irrigation District relative to the closing of automatic circuit breakers, it being conceded that both of the aforementioned companies were among the best managed in the state of California.

[3] The third proposition is also untenable. Defendants urge that this instruction is vulnerable to these objections:

(1) It shifts to defendants the burden of proving that they were not negligent.

(2) The cause of the injury being established, the doctrine of res ipsa loquitur is inapplicable.

The first objection is without merit. In Bergen v. Tulare County Power Co., 173 Cal. 709, 161 P. 269, the trial court in giving an instruction relative to the doctrine of res ipsa loquitur stated that, if plaintiff had established by a preponderance of evidence the death of her decedent, while he was exercising ordinary care, by an excessive and dangerous current furnished by defendant through the electric light wire, "it then devolved upon defendant to show that the excessive voltage was not due to its negligence".

In the case just cited our Supreme Court in passing upon the same objection as defendants make here held that the giving of the instruction was not erroneous, saying at page 720 of 173 Cal., at page 273 of 161 P., with reference to the language of the instruction which we have quoted, "This did not unduly extend the doctrine res ipsa loquitur as appellant complains that it did."

In Holt v. Yellow Cab Co., 124 Cal.App. 385, 12 P.2d 472, 474, the trial court in giving an instruction upon the doctrine of res ipsa loquitur concluded the instruction with this statement, "When and if the plaintiff makes such proof, the burden of proof shifts to the defendants to show their freedom from negligence." The court in Holt v. Yellow Cab Co., supra, held that it was not error to thus instruct the jury, saying at page 390 of 124 Cal.App., at page 474 of 12 P.2d, "* * * the effect of such language * * * is not to shift the burden of proof of the entire case to the defendant, but merely to point out to the jury that, where the presumption applies, the defendant must then meet the prima facie case with sufficient evidence to balance any presumption of negligence upon his part. * * * *The point here raised by appellants has been frequently considered, and we think it must be taken as established that the use of such language is not reversible error,* where the rest of the instructions are proper." (Italics added.)

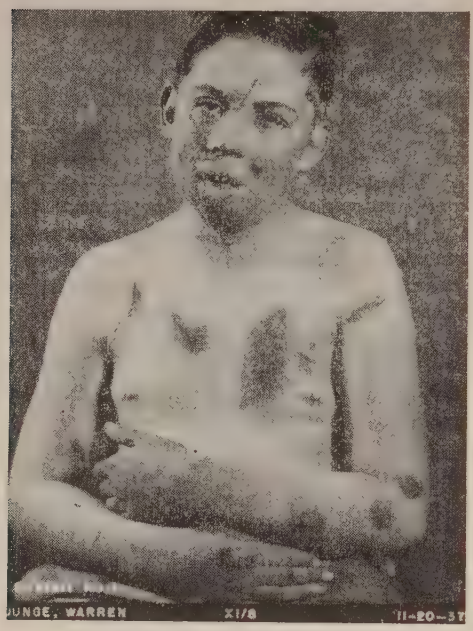
[4] The second objection is likewise without merit. The giving of an instruction on the doctrine of res ipsa loquitur, even though such doctrine is inapplicable, is not prejudicial error where, as in the instant case, the jury has been properly instructed that the burden is on the plaintiff to prove by a preponderance of the evidence that the negligence of the defendant is the proximate cause of the injury, and there is substantial evidence of defendant's negligence. Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 471, 27 P.2d 365, 90 A.L.R. 1071; Gonzalez v. Nichols, 110 Cal. App. 738, 742, 294 P. 758.

[5] Defendants' fourth proposition is without merit. The law is established that the jury's verdict will not be set aside upon appeal on the ground that damages are excessive, unless the verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice, or corruption. Corvin v. Hyatt, 10 Cal.App.2d 107, 108, 51 P.2d 176.

[6] In the instant case the amount of the awards does not fall in this category.

(a) A mere examination of the injuries of plaintiff Warren Junge as shown in plaintiffs' exhibits 1 and 2 makes it clear that the award of $35,000 to him does not fall within the purview of the rule just stated. Nor does it fall within the purview of the rule of such cases as Mondine v. Sarlin, 11 Cal.2d 593, 81 P.2d 903; Maede v. Oakland High School Dist., 212 Cal. 419, 298 P. 987; Loeb v. Kimmerle, 215 Cal.

143, 9 P.2d 199; and Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 81 P.2d 894. The following photographs are plaintiffs' exhibits 1 and 2 above referred to:







(b) As to the plaintiff John L. Junge, father of Warren Junge, it is likewise clear that the verdict for $10,000 in his favor does not fall within the scope of the rule hereinbefore mentioned, since the evidence disclosed that the cost of hospitalization, plastic surgery, etc., for plaintiff Warren Junge amounted to $6,532, leaving $3,468 as compensation for the father's loss of his son's services over a period of two and one-half years, the period during which it is estimated that the injured plaintiff will be unable to work. This is certainly not such a sum as under the circumstances of this case would suggest passion or prejudice at first blush.

For the foregoing reasons the judgments are and each is affirmed.

I concur: MOORE, P. J.

WOOD, Justice (concurring).

I concur in the judgment. The trial court did not err in instructing the jury on the doctrine of res ipsa loquitur. Under this doctrine the burden of proof did not shift to defendants but required them to produce sufficient evidence to overcome the prima facie showing of negligence. To do this it was necessary for them to establish to the satisfaction of the jury that the line was properly constructed with adequate safety appliances and that it was operated and maintained with proper care. Manuel v. Pacific Gas & Elec. Co., 134 Cal.App. 512, 25 P.2d 509; Phillips v. Southern Cal. E. Co., Ltd., 23 Cal.App.2d 222, 72 P.2d 769. It was the function of the jury to determine whether defendants presented sufficient evidence to offset the prima facie case created by the application of the res ipsa loquitur rule. Helms v. Pacific Gas & Elec. Co., 21 Cal.App.2d 711, 70 P.2d 247.

The court did not err in sustaining objections to the hypothetical questions by which defendants sought to prove that the employee of defendant corporation acted in accordance with approved practice in reclosing the switch. The questions did not contain all of the elements shown to be present at the time of the accident. Moreover, the witnesses in describing the practices followed by the companies by which they were employed in effect answered the questions to which objections were sustained.

38 Cal.App.2d 227

**SWANTON v. CORBY, Mayor, et al.**

**Civ. 2519.**

District Court of Appeal, Fourth District, California.

March 29, 1940.

**1. Municipal corporations ⇐236**

A municipality may purchase supplies and materials and hire labor without advertising for bids, if law or charter under which it was organized and exists does not require contract therefor to be let to lowest bidder after advertising for bids.

**2. Municipal corporations ⇐330(1)**

The words "public works," as used in section of Municipal Corporation Act, requiring that erection, improvement, and repair of public buildings and works be done by contract, let to lowest responsible bidder after notice, when expenditures required therefor exceed $500, do not include two-way short wave radio erected for exclusive use of city police department. St.1933, p. 1334, § 874.

The term "public works" has been defined as embracing all fixed works constructed for public use or protection.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Works".

**3. Municipal corporations ⇐236**

Personal property, used in construction of two-way short wave radio for city police department, may be purchased, and labor to construct radio hired, by sixth-class city without advertising for bids, where no item of expense equals $500. St.1933, p. 1334, § 874; St.1935, p. 2069, § 862.2.

**4. Municipal corporations ⇐63(1)**

Whether two-way short wave radio was necessary or proper appliance to be furnished city police department was matter within city council's discretion, and, having been decided by such body, cannot be considered by court in elector's action to recover money expended for labor and materials used in erection of radio. St.1935, p. 2069, § 862.2.

---

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Elmer E. E. Swanton against Grant W. Corby, as mayor and member of the city council of the city of Arcadia, and others to recover money expended for labor and materials used in erection of a short wave radio for use of the city police. Judgments for defendants, and plaintiff appeals.

Affirmed.

Cecil L. Lacy, of Monrovia, for appellant.

William R. Elam, of Arcadia, and Dunn & Sturgeon, of Monrovia, for respondents.

MARKS, Justice.

Plaintiff, an elector and taxpayer of the City of Arcadia, brought this action to recover from defendants, except the city, and have paid into the city treasury, money expended for labor and materials used in the erection of a two-way short wave radio for use of the city police. Demurrers to the complaint were sustained without leave to amend. This appeal is taken from the judgments thereafter entered in favor of the demurring defendants.

Arcadia is a city of the sixth class. The individual defendants are officers of the city, merchants who supplied materials for, and laborers who erected, the radio.

The city did not advertise for bids for the materials and labor used in the radio, but purchased the materials in the open market. Separate demands were filed, allowed and paid for each item. The smallest bill for supplies was $8.16 for miscellaneous ropes and pullies, and the largest $375 for high frequency transmitter and frequency meter monitor. Two bills for labor, one for $8 and one for $78, were paid. There was one bill for $14.42 for labor and materials. The first bill is dated November 4, 1936, and the last February 16, 1937. The completed radio cost $902.46. There is no allegation of any fraud or dishonesty in any of the contracts nor that an excessive price was paid for any of the materials or labor.

The sole question presented is whether or not under section 874 of the Municipal Corporation Act (Stats.1883, p. 93, as amended, Stats.1933, p. 1334) the city was required to advertise for bids for the materials and labor used in building the radio. That section contains the following: "In the erection, improvement, and repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, bays, or water fronts, or in or about embankments, or other works for protection against overflow, and in furnishing any supplies or materials for the same,

when the expenditures required for the same exceed the sum of five hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after notice * * *."

It is clear that the only possible classification that could include the material and labor here involved is the first phrase which concerns itself with the "erection * * * of all public * * * works".

[1] It is well settled in California that a municipality may purchase supplies and materials and hire labor without advertising for bids if the law or charter under which it is organized and exists does not require the contract for such supplies, materials or labor to be let to the lowest bidder after advertising for bids. Electric, etc., Co. v. San Bernardino, 100 Cal. 348, 34 P. 819; Sarver v. Los Angeles, 156 Cal. 187, 103 P. 917; Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410, 412. In the last-cited case the Supreme Court was considering provisions of the charter of Los Angeles somewhat similar in effect to the statute we are here considering. It was there said: "By other provisions of sections 148 and 207 of the charter, a 'contract' involving an expenditure of not exceeding $500 is excepted from the requirements of being in writing, and being let only after notice inviting bids. The charter provisions taken together undoubtedly require that wherever it is proposed to make an agreement for the purchase of certain materials or supplies for a sum exceeding $500, or to make an agreement with another by which he is to furnish such labor for a sum of money exceeding $500, a written contract must be let and entered into in the manner prescribed. But do they require anything else? We are of the opinion that they do not, and are satisfied that they should not be construed as prohibiting the doing of public work by the city itself by day's labor."

See, also, Warren Brothers Co. v. Boyle, 42 Cal.App. 246, 183 P. 706; Miller v. Boyle, 43 Cal.App. 39, 184 P. 421.

[2] The decisions defining what are public works are considered in 22 California Jurisprudence, page 74, where it is said: "The term 'public works' may be said to embrace all fixed works constructed for public use or protection. However, as has been remarked, the question as to what works fall within this classification seems to be, so far as the decisions are concerned, one of construction and application of statutes. In view of the acts authorizing public improvements the term probably includes bridges, waterworks, sewers, light and power plants, public buildings, wharves, breakwaters, jetties, seawalls, schoolhouses and street improvements. And the term 'building' as used in such an act has been held to include a fence to be constructed around public property."

See, also, Cutting v. McKinley, 130 Cal. App. 136, 19 P.2d 507.

It is not alleged that the radio was installed in the erection, improvement or repair of any public building. We think from the allegations of the complaint that it more nearly resembles a furnishing in a public building and comes within the rule announced in Sarver v. Los Angeles, supra, where it was held that steel cells and tanks installed in a jail after the building was completed were in the nature of furnishings for the building that could be purchased without advertising for bids and without letting a contract, even though the cost was more than $500. We therefore conclude that the words public works, as used in section 874 of the Municipal Corporation Act, should not be held to include a two-way short wave radio erected for the exclusive use of the Arcadia police department.

[3] Further, section 862.2 of the Municipal Corporation Act, as added by St.1935, p. 2069, gives to a city council of a city of the sixth class power "To purchase * * * such * * * personal property as may be necessary or proper for municipal purposes * * *." This section apparently gives to the city council power to purchase furniture and furnishings for a building. It must be construed with section 874 of the same act so that the two may be brought into harmony. As far as we have been able to ascertain, furniture and furnishings have never been held to be "public works". Certainly under the common and generally accepted definitions of the terms the furniture and furnishings of a building would not be construed as the public works of a city. As far as we are concerned here, only contracts for public works costing more than $500 need to be let after advertising for bids. By necessary inference the personal property to be used in the construction of the two-way short wave radio may be purchased and the labor to construct it may be hired without the necessity for advertising for bids.

[4] Whether or not the radio here involved was a necessary or proper appliance to be furnished to the police department was a matter within the discretion of the city council and that question having been decided by that body, there is nothing left for court decision on it. No item of expense in connection with the installation of the radio equaled $500. Its total cost was $902.46, which was spread over a period of more than three months. We find no provision in the Municipal Corporation Act that would prohibit the purchase of the materials and payment for the labor used in erecting the radio by the City Council of Arcadia, that body having determined the radio to be necessary for municipal use.

It follows that the complaint failed to state a cause of action and the demurrers to it were properly sustained.

The judgments are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.




38 Cal.App.2d 144

**PEOPLE v. COWAN.**

**Cr. 2072.**

District Court of Appeal, First District, Division 1, California.

March 23, 1940.

**1. Criminal law ⇐311**

In forgery trial, it was unnecessary for defendant, pleading not guilty and not guilty by reason of insanity, to call witness to prove his sanity at time of trial on issue of not guilty, as he was presumed to be sane. Pen.Code, §§ 1016, 1026.

**2. Criminal law ⇐625**

In trial on defendant's plea of not guilty of forgery, court properly refused to permit defendant to call psychiatrist to testify as to his sanity at time of trial before hearing on his plea of not guilty by reason of insanity at time of offense, though purpose was to enable him to engage counsel, psychiatrists and handwriting experts, where he had theretofore voluntarily proceeded with trial of cause without assistance of legal counsel chosen by himself, did not contend that such witness could have been of assistance as handwriting expert, and demonstrated by vigorous personal cross-examination of witness that absence of counsel did not result in unfair hearing or prejudice defendant.

**3. Criminal law ⇐641(1)**

Where defendant, pleading not guilty of forgery and not guilty by reason of insanity, stated at about time of conclusion of case on issue of not guilty that he demanded attorney, but proceeded to conduct trial on issue of not guilty because of insanity without objection, examined himself as witness, and testified that he was defending himself because he lacked adequate funds to appoint counsel and desired to establish his restoration to competency and did not call on public defender's services because he was advised that no attorney would consent to subpoena as many witnesses as he desired to call, his attitude was equivalent to declination of counsel or at least waiver thereof.

**4. Criminal law ⇐624**

While trial based on denial of accusation by plea of not guilty, together with confession and avoidance by plea of not guilty because of insanity, may combine two issues, any separation is one of form, not substance.

**5. Jury ⇐29(7)**

A voluntary waiver of jury trial by defendant in criminal case cannot be withdrawn on trial, except in court's discretion.

**6. Jury ⇐29(7)**

Where defendant, pleading not guilty of forgery and not guilty by reason of insanity, voluntarily and regularly waived jury trial, trial judge did not abuse his discretion in denying defendant's request for such trial after disposition of case in chief on issue of not guilty.

**7. Criminal law ⇐624**

One pleading not guilty of felony charged and not guilty by reason of insanity cannot complain of district attorney's failure to inform accused that he had been discharged from insane asylum as sane before hearing on issue of not guilty because of insanity, at which such officer introduced certificate of accused's discharge from hospital as exhibit, as such certificate, regardless of time of filing thereof, did not prove that accused was legally insane at time of offense charged, but could be considered, if at all,

only as indication that he was medically insane, and it would have been available to him on his application before trial on felony charge.

**8. Criminal law ⇐1144(9)**

On appeal from conviction of one conducting his own case and moving to discontinue proceeding on ground that he was not declared legally sane when released from insane asylum, it is presumed that trial court performed its duty to determine whether defendant's manner, actions and conduct of case warranted statutory proceedings to determine question of his sanity. Pen.Code, §§ 1367, 1368; Code Civ.Proc. § 1963.

**9. Criminal law ⇐624**

One pleading not guilty of felony by reason of insanity waived calling of witnesses from outside county in addition to residents of county, who were subpoenaed and testified to prove defendant's insanity, by stating that he would not call other witnesses, if permitted to give his life history before three alienists mentioned by court, and would ask no greater privilege than to go on witness stand and tell all about his injuries and activities, as court said he was going to let defendant do.

**10. Insane persons ⇐84**

A person's discharge from state hospital for insane under either ordinary psychopathic procedure or Penal Code provisions did not abridge state's right to place him on trial for forgery committed before his commitment to hospital. St.1937, pp. 1160, 1164, §§ 6725 et seq., 6760 et seq.; Pen. Code, §§ 1026, 1368.

**11. Criminal law ⇐1139**

On appeal from conviction of forgery by one pleading not guilty and not guilty by reason of insanity, appellant's application for leave to submit additional evidence of his plea to information charging similar offense in another county, order directing his detention in hospital for observation, and his petition for writ of habeas corpus, as evidenced by title alone, must be denied, as such documents are not pertinent on question of his insanity at time of offense for which convicted or resulting trial therefor, where such commitment to hospital and order dismissing information were introduced as exhibits.

**12. Criminal law ⇐260(12)**

An appellate court's power to make fact findings contrary to, or in addition to, those of trial court in case wherein jury trial is not matter of right or jury has been waived, is given only when such findings would constitute basis for affirmance on appeal or for reversal with directions to enter judgment for appellant. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

**13. Criminal law ⇐260(12)**
**Jury ⇐29(1)**

The constitutional provision for waiver of jury trial and code section, authorizing appellate court to make fact findings contrary to or in addition to those of trial court when such findings would constitute basis for affirmance of judgment appealed from or reversal thereof with direction to enter judgment for appellant, do not apply to criminal cases. Code Civ.Proc. §§ 1, 956a; Const. art. 6, § 4¾.

**14. Constitutional law ⇐29**

The constitutional provisions for waiver of jury trial are not self-executing. Const. art. 6, § 4¾.

**15. Criminal law ⇐1139**

Appellate courts have no power to take additional evidence in criminal cases. Code Civ.Proc. § 956a; Pen.Code, § 1152.

---

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Robert C. Puter, alias H. A. Cowan, was convicted of forgery, and he appeals.

Affirmed.

Robert C. Puter, in pro. per., and Otto G. Foelker, of Oakland, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is an appeal by defendant from a conviction of the crime of forgery, and from the order denying his motion for a new trial. To the charge, defendant had pleaded not guilty and not guilty by reason of insanity.

The information, filed November 4, 1938, alleged the commission of the offense on or about January 19, 1937, also a prior conviction, which the defendant admitted. Subsequent to the commission of the alleged offense and prior to the filing of the information, appellant had been an inmate as an insane person of the Mendocino State Hospital.

On the issue of not guilty, wherein a trial by jury was duly and regularly waived, the defendant originally was represented by counsel. Subsequently, with the consent of the court, the attorney withdrew, following his protest that the defense had been "carried on in a manner not contemplated by me", to which the defendant replied: "Well, I think that I can carry it on competently myself." Evidence was offered of the offense charged, and of other similar offenses. The defendant objected to the questions propounded by the district attorney, and cross-examined the witnesses himself, but otherwise offered no defense to the case presented except the plea of not guilty by reason of insanity, which if proven would affect only the element of criminal intent, although at the conclusion of the evidence presented on behalf of the people in connection with the forgery charge, he requested that a Dr. Rappaport be called as a witness, upon which the trial judge stated that Dr. Rappaport would be available at the next session of the court to testify upon the issue of not guilty by reason of insanity.

[1, 2] The transcript covering the incidents attending the closing of the people's case reads as follows:

"Mr. Puter: No questions.

"Mr. Chamberlain: The people rest.

"The Court: The People have rested their case on the plea of not guilty to the offense of forgery alleged in the information. It is now your turn. Put on your case on the plea of not guilty.

"Mr. Puter: I want to call—

"The Court: What do you expect to do?

"Mr. Puter: I want to establish my insanity.

"The Court: That is not proper for you to do so at this stage of the trial. You will have a chance at the end of the trial on your plea of not guilty to produce witnesses on your plea of not guilty by reason of insanity. The law says so far as the issue of the checks are concerned you are conclusively presumed to be sane. We finished that part and go to the other part of the trial, in other words on the plea of not guilty by reason of insanity, which is a sort of plea which means you are not responsible for what you did. I will read you the code section in that regard. (The Court reads.) If you want to take the stand yourself now is the time to do it. Then we will go into the other half of the trial. Do you wish to rest your defense on this charge at this time?

"Mr. Puter: Yes, the defense rests.

"The Court: Do you want to argue the case at this time?

"Mr. Puter: No, sir.

"The Court: Is the matter submitted?

"Mr. Chamberlain: Yes, your Honor.

"Mr. Puter: Yes, your Honor."

Some confusion arises in the briefs relative to the statement made by the defendant in the foregoing excerpt; that is, whether he used the word "insanity" or "sanity". Appellant admits that if the purpose was to establish the "insanity" as of the date of the commission of the offense, the court was correct in denying defendant the right to call Dr. Rappaport before that issue was ready for hearing. Assuming, but not admitting, that the court reporter misunderstood and recorded the word "insanity" instead of "sanity" and that appellant sought to prove his sanity as of the date of the trial, then it was unnecessary to call a witness to prove defendant's sanity upon the not guilty charge, as the defendant was presumed to be sane. Pen.Code, secs. 1016, 1026. If the purpose was to engage "counsel, psychiatrists and handwriting experts", which appellant claims could not be done if he was insane, the answer is that theretofore defendant had voluntarily proceeded with the trial of the cause without the assistance of the legal counsel chosen by himself. It is not even hinted that Dr. Rappaport, a psychiatrist, could have been of assistance as a handwriting expert. Subsequently Dr. Rappaport was called and was submitted to a rigorous cross-examination by the defendant personally, who demonstrated that the absence of counsel did not result in an unfair hearing or that he was in anywise prejudiced. Not one word appears relative to handwriting. There is no claim made that appellant was in fact insane at the time of the hearing upon either proceeding, except as hereinafter appears.

[3] About the time of the conclusion of the case on the issue of not guilty, and before the hearing upon the issue of not guilty by reason of insanity, the defendant stated: "I demand an attorney * * *." Nevertheless, without objection, defendant proceeded to conduct the trial upon the issue of not guilty by reason of insanity, wherein the following appears:

"Mr. Puter: I understand. Before I proceed to tell the story of my life I will

ask if you will allow me to examine myself?

"The Court: What do you wish?

"Mr. Puter: I am acting as my own counsel. I wish to call the defendant to the stand and examine the defendant as counsel, acting as second and first parties, asking myself questions and answering them. I would like to examine myself personally. * * *

"Mr. Puter: Q. Mr. Puter, what is your business? A. Draftsman.

"Q. You are the defendant in this case? A. Yes.

"Q. Mr. Puter, please tell the court why you are defending yourself in this case? A. Your Honor, because I am without adequate funds to appoint counsel and because I desire absolutely to establish the fact of my restoration to competency.

"Q. Mr. Puter, why did you not call upon the services of the Public Defender? A. Because, even though I realize the Public Defender would defend me ably, still I have been advised no attorney would consent to subpœnaing so many witnesses, and it appeared, without corroboration of past events by witnesses my defense would be misconstrued."

It seems to us apparent that the defendant did not in fact desire the services and counsel of an attorney either in the conduct of the trial on the forgery charge or in connection with the hearing upon the insanity plea, but that, as appears from the record, he desired to select an attorney who would agree to subpœna one hundred and thirty-five witnesses from the county and elsewhere. The attitude of the defendant was the equivalent of a declination of counsel, or at least a waiver thereof. People v. Rocco, 209 Cal. 68, 285 P. 704.

[4-6] When the case in chief had been disposed of, defendant requested a jury trial, but a jury had theretofore been waived and the court used its discretion in denying the request. The trial, based upon a denial of the accusation by a plea of not guilty, together with a confession and avoidance by a plea of not guilty by reason of insanity (People v. Leong Fook, 206 Cal. 64, 273 P. 779), may combine two issues, nevertheless any separation is one of form and not of substance. In People v. Troche, 206 Cal. 35, 273 P. 767, treating a similar question, though in that case both issues were tried by a jury, the court, at page 48 of 206 Cal., at page 772 of 273 P., said: "The trial had by the defendant, under the present law, amounted to one trial, and no more. The defendant was charged with the commission of but one crime, and his pleas to the one accusation, constituting his answer and defense, tendered the issues for investigation by the court and the jury selected to try the case." See, also, People v. Love, 21 Cal.App.2d 623, 70 P.2d 202; People v. French, 12 Cal.2d 720, 765, 87 P. 2d 1014. In the instant case, a trial by jury had been voluntarily and regularly waived. "In cases where a jury trial may be waived in a criminal case, a waiver once voluntarily made cannot afterwards be withdrawn on the trial, except in the discretion of the court." 35 Cor.Jur., Juries, sec. 140, p. 222. We cannot say under the circumstances of this case that there was an abuse of discretion on the part of the trial judge.

On appeal, defendant represented himself in the filing of opening and closing briefs; subsequently he was represented by counsel in the filing of a "supplemental brief".

With reference to his request that Dr. Rappaport be called in connection with the issue of not guilty, appellant contends that regardless of the nature of the testimony sought to be elicited from Dr. Rappaport relative to this issue, it was none the less his right to call the witness prior to the hearing on the issue of not guilty by reason of insanity.

[7] It is appellant's claim that, having been committed as an insane person and having been released from the asylum, he was entitled to know that he had been discharged as sane before being placed on trial on a felony charge, and that the district attorney was remiss in his duty in neglecting to inform appellant that he had been discharged from the hospital as sane. Our attention has not been called to any statute or rule requiring such action on the district attorney's part, but the district attorney actually introduced as an exhibit upon the hearing a certificate of appellant's discharge from the hospital. Appellant now objects that it was filed too late to be of advantage to him. Regardless of the time of its filing, the certificate would not have per se proven that appellant was legally insane at the time of the commission of the offense charged in the information. It could be considered, if at all, as indicative only that appellant was medically insane, which, standing alone, affords no reasonable inference that he did not appreciate the nature and quality of his act or could

not distinguish right from wrong, and would not be sufficient to establish legal insanity at the time of the commission of the offense. People v. French, supra. In People v. Willard, 150 Cal. 543, 553, 554, 89 P. 124, 128, the court said: "There are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from such responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. A person may be partially insane, or be insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsible under the law for a criminal act committed by him." It is an erroneous assumption that the method of release is a pronouncement of legal sanity. The complete answer is that the certificate of discharge would, upon his application, have been available to appellant before the trial on the felony charge.

[8] It might be claimed that it was the duty of the court upon its own motion to halt the hearing and proceed under the provisions of sections 1367 and 1368 of the Penal Code. The transcript shows that appellant, addressing the court, said: "At this time I would like to make a motion that the proceedings in this trial be discontinued on the ground that the defendant has not yet been legally restored to sanity. I have not had any documents of any kind read to me telling that my sanity has been restored. * * * Your Honor, if the case proceeds it proceeds on my objection that the proceedings are incompetent, irrelevant and immaterial, and on the ground that the defendant who is being tried is still legally insane, that he has not been declared legally sane." It is not claimed that appellant predicated his motion to discontinue the proceeding upon the ground that he was in fact insane at the time of trial, but rather "that he has not been declared legally sane". The trial court had an opportunity to observe the appellant and to determine whether or not his manner, actions and conduct of his own case warranted proceedings under section 1368 of the Penal Code. It is presumed that the court performed its duty. (Code Civ.Proc., sec. 1963.) A reading of the cold record indicates that appellant conducted the trial in a manner calculated to protect his rights both under the law and the facts.

[9] Appellant admits the right and power of the court to limit the number of witnesses whose testimony is cumulative, and it is conceded that he "would not have needed 135 witnesses to prove his insanity on the day in question", but it is claimed that the court should not have foreclosed appellant of his right to call other witnesses from outside the county. The court approved the issuance of certain subpoenas to residents of the county. Ten witnesses actually appeared and testified. After discussion with the court relative to the number of witnesses to be called, the following appears in the transcript:

"Mr. Puter: That is all that is necessary then. If you give me permission to give my life history before these three alienists you have mentioned and have the information exhibited to them I will be glad not to call the other witnesses. * *

"The Court: I am going to let you go on the witness stand and tell all about your injuries, your activities and have the doctors look them over.

"Mr. Puter: I would not ask a greater privilege than that."

If the trial court abused its discretion—which we cannot hold—nevertheless appellant waived the calling of further witnesses. In the brief, presumably written and signed by appellant, it is claimed that "appellant immediately displayed his total incompetence to act as his own counsel by asking subpoena of one hundred and thirty-five witnesses". Appellant does not contend that he proved his insanity, or that the evidence was insufficient to prove him legally sane, but that the court committed errors which prevented a proper presentation of his insanity defense.

[10] Appellant was committed by the superior court of the city and county of San Francisco to Mendocino State Hospital under the ordinary psychopathic procedure (see Welfare and Institutions Code, St. 1937, pp. 1160, 1164, div. VI, pt. 4, arts. 8 and 9, §§ 6725 et seq., 6760 et seq., rather than under the provisions of Penal Code sections 1026 or 1368. He now contends that the discharge under the former procedure deprived him of civil restoration to capacity. Either mode of discharge

would not abridge the right of the state to place him upon trial on the forgery charge contained in the information filed in Alameda county and the evidence does not indicate that in fact appellant was precluded by the method of his discharge from engaging an attorney, or handwriting expert, on the felony charge, nor the assistance of psychiatrists in the presentation of any claim of insanity upon the date of the commission of the offense, nor from a proper presentation of his insanity defense in any respect.

[11] Before the submission of this case on appeal, appellant filed an "Application for leave to submit additional evidence that existed prior to and after judgment and which materially affects the substantial rights of the appellant in determination of this appeal." An affidavit was filed in support of such application, to which the following documents were attached, certified copies of: a plea entered in the superior court of the city and county of San Francisco, to an alleged separate and distinct offense from that in the present charge; an order directing the detention of defendant in a hospital for observation; an order of commitment; the dismissal of the action one year later; a copy of a petition presented to said superior court for a writ of habeas corpus and an application for legal restoration to sanity; appellant's discharge from the Mendocino State Hospital, signed by the medical superintendent prior to the dismissal of the San Francisco case, and an affidavit attached to a list of 135 names of persons whom appellant desired subpoenaed in this case. This list was presented to the trial court and has been heretofore referred to. An affidavit alleging insanity filed by the sister of appellant, the warrant of apprehension, the commitment, and the discharge indicating recovery from psychosis, that is, from any mental derangement, were received in evidence, marked as exhibits and have been considered upon appeal. The plea to the information upon a similar charge in another county, the order of detention for observation and the petition for habeas corpus, as evidenced by the title alone, are not pertinent and could not have assisted in proving insanity upon the date of the alleged commission of the present offense or at the resulting trial in view of the introduction as an exhibit of the commitment and the order dismissing the information in another county.

[12] In the supplemental brief of appellant, filed by an attorney under an authorization to take such steps as might be necessary in prosecuting the appeal, it is contended that this court's power to hear additional evidence finds support in the provisions of section 956a of the Code of Civil Procedure and those of rule XXXVIII of the rules for the Supreme Court and the District Courts of appeal.

Rule XXXVIII is a procedural method outlining the steps necessary to the requirements of section 956a. When a jury trial is not a matter of right, or where a jury has been waived (art. VI, sec. 4¾ of the Constitution of the state of California), the court to which the matter has been appealed may make findings of fact contrary to, or in addition to, those made by the trial court. Code Civ.Proc., sec. 956a, supra. This power is given only when such findings would constitute a basis for an affirmance on appeal, or for a reversal when the appellate court would be justified in reversal, with directions to the trial court to enter judgment for appellant. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970.

[13] The constitutional provision and the code section do not apply to criminal cases. This is demonstrated by the fact that section 1 of the Code of Civil Procedure divides that code into four parts. Section 956a appears in part II of that code, entitled "Civil Actions", under title XIII, "Appeals in Civil Actions", chapter I. The constitutional amendment was proposed in 1925 (Stats. 1925, chap. 55, p. 1380) and adopted in 1926. Section 956a was passed, approved and became effective in 1927. Stats. 1927, chap. 352, p. 583. The Constitution, prior to amendment, provided that "a trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in open Court". Constitution 1849, as revised in 1879, art. I, sec. 7. In 1928, this section of article I of the Constitution was amended by the people under a constitutional amendment submitted by the legislature (Stats. 1927, chap. 60, p. 2367) by striking out the words "not amounting to felony", and the right conferred to waive a trial by jury in a criminal case if consent was "expressed in open court by the defendant and his counsel".

[14, 15] At the time of the adoption of section 4¾ a jury trial on a felony charge could not be waived and hence that section did not have reference to criminal cases. The provisions of section 4¾ of article VI

are not self-executing. Tupman v. Haberkern, supra. If it be assumed that the power to take additional evidence in criminal cases, even on special verdicts (Pen. Code, sec. 1152) could be conferred on appellate courts, the answer is that the legislature has not seen fit to do so. The existing legislation has limited that power to civil cases.

The application to submit additional evidence is denied. The judgment of conviction and the order denying a motion for a new trial are affirmed.

We concur: PETERS, P. J.; KNIGHT, J.




38 Cal.App.2d 305

**In re RAYMOND'S ESTATE.**

**AHLBORN v. PETERS.**

**Civ. 12446.**

District Court of Appeal, Second District, Division 2. California.

April 3, 1940.

**1. Wills ⇐203**

A petition for the probate of a will marks the first step in a "special proceeding," not the commencement of an "ordinary proceeding * * * by which one party prosecutes another," within terms of statutory definition of "action." Probate Code, § 350; Code Civ.Proc. § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding" and "Action".

**2. Executors and administrators ⇐1**

Proceedings for the settlement of estates are not "civil actions," but are "special proceedings in rem" and are covered by provisions of the Probate Code rather than by rules applicable to civil actions generally. Code Civ.Proc. §§ 22, 581, subd. 1; Probate Code, §§ 350, 371.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Actions" and "Special Proceedings in Rem".

**3. Wills ⇐310**

In contests of wills before probate, distinct though connected proceedings are before the court, one involving petition of proponent for admission of the will to probate and the other involving contest based on written grounds of opposition.

**4. Wills ⇐307**

The contestant who filed written grounds of opposition to probate of will, and not the person who presents will for probate, is a "plaintiff" in an "action" within terms of statute authorizing dismissal by plaintiff. Code Civ.Proc. § 581, subd. 1; Probate Code, § 371.

See Words and Phrases, Permanent Edition, for all other definitions of "Plaintiff".

**5. Wills ⇐307**

The proponent of a will cannot suppress will before it is offered for probate, nor bring about the same result by withdrawing his petition for probate at his option. Code Civ.Proc. § 581, subds. 1, 4; Probate Code, § 320.

**6. Wills ⇐307**

Neither the proponent of a will nor a party filing contest to petition for probate can divest the court of its jurisdiction to settle issues presented by petition for probate. Code Civ.Proc. § 581, subds. 1, 4; Probate Code, § 320.

**7. Wills ⇐384**

One appealing from minute order denying petition for probate of will and contending that such order was a final determination of the subject matter could not be aggrieved by the signing of a later order which did not alter effect of the minute order.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceeding in the matter of the estate of Louie E. Raymond, deceased, wherein Frederick R. Ahlborn filed petition for probate of will, and Grace Raymond Peters filed written opposition. From orders denying probate of the will, after petitioner had attempted to dismiss the petition, petitioner appeals.

Affirmed.

Cantillon & Glover, J. F. T. O'Connor, and Ronald Button, all of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondent.

WOOD, Justice.

A petition was filed by appellant on July 22, 1938, for the probate of a will alleged to have been executed by Louie E. Raymond, deceased, and to have been destroyed by Grace Raymond Peters. Written opposition to the petition for probate of the alleged lost will was filed by Grace Raymond Peters. Mary S. Raymond and others filed an answer to the written opposition of Grace Raymond Peters but a demurrer to their answer was sustained without leave to amend. Appellant also filed an answer to the written opposition of Mrs. Peters. The hearing on appellant's petition was continued to February 8, 1939, at which time the court commenced to receive evidence on the issues presented. On March 15, 1939, appellant filed with the clerk of the court a written notice to enter the dismissal of his petition for the probate of the destroyed will. On March 20, 1939, the court made the following order: "Hearing resumed from March 16, 1939, all parties present as heretofore. Argument resumed and concluded and the court finds that the filing of a dismissal of the petition of Frederick R. Ahlborn with the clerk was ineffectual for any purpose and that the petition to probate the alleged destroyed will of Louie E. Raymond fails to meet the requirements of section 350 of the Probate Code and for that reason the probate of the will is denied." On April 20, 1939, the court made and filed findings of fact and conclusions of law and entered a formal order denying appellant's petition. Appeals have been taken from the orders of March 20, 1939, and April 20, 1939.

[1, 2] By his notice of dismissal, which was addressed to the clerk of the court, appellant unquestionably sought to dismiss his petition under the provisions of subdivision 1 of section 581 of the Code of Civil Procedure. This section contains five different subdivisions providing the conditions under which civil actions may be dismissed and the methods for bringing about the dismissals. The first part of the section reads as follows: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff, by written request to the clerk, filed with the papers in the case, or by oral or written request to the justice where there is no clerk, at any time before the trial, upon payment of the costs of the clerk or justice; provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking shall upon such dismissal be delivered by the clerk or justice of the peace to the defendant who may have his action thereon." An action is defined in section 22 of the Code of Civil Procedure as follows: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." A petition for the probate of a will marks the first step in a special proceeding. It does not mark the commencement of an ordinary proceeding by which "one party prosecutes another". Proceedings for the settlement of estates are not civil actions; they are special proceedings in rem and are covered by the provisions of the Probate Code rather than by the rules applicable to civil actions generally. Estate of Olcese, 210 Cal. 262, 291 P. 193, Estate of Dolbeer, 153 Cal. 652, 96 P. 266, 15 Ann.Cas. 207; Estate of Joseph, 118 Cal. 660, 50 P. 768.

[3, 4] Subdivision 1 of the section under consideration provides that the action may be dismissed before the trial by the plaintiff when no affirmative relief has been sought by the defendant. It is noteworthy that one who files a petition for the probate of a will is not designated as a plaintiff. If opposition be filed to the probate of a will it is expressly provided by section 371 of the Probate Code that "the contestant is plaintiff and the petitioner is defendant". Two distinct though connected proceedings are before the court in cases of contests of wills before probate. One involves the petition of the proponent for the admission of the will to probate and the other involves a contest based on written grounds of opposition filed by the contestant, who becomes the plaintiff referred to in the Probate Code. Estate of Cullberg, 169 Cal. 365, 146 P. 888. One who presents a will for probate is in no sense a "plaintiff" in an "action" such as is contemplated by subdivision 1 of section 581 of the Code of Civil Procedure. The decisions in Estate of Cook, 205 Cal. 581, 271 P. 1083, and Estate of Knauft, 59 Cal.App. 536, 211 P. 29, relied upon by appellant, are not deter-

minative of the issue. In both of these cases contests had been filed and the contestants, who were in the position of plaintiffs, obtained dismissals of their contests, not under subdivision 1 of section 581, but under subdivision 4 of this section by directing motions to the court.

[5, 6] The nature of a proceeding for the probate of a will is such that the proponent of the will may not withdraw his petition at his option. It is provided in section 320 of the Probate Code that the custodian of a will must within thirty days after being informed that the maker of the will is dead deliver it to the clerk of the court or to the executor named in the will. Neither the custodian nor the executor has the right to withhold a will properly executed from admission to probate. They may withdraw from any individual interest in the will but the interests of others, including the state, must be protected. The proponent may not withdraw his personal interest in a will in such manner as to cause the proceedings to fail and the provisions of the will to become nullified. Other parties, heirs at law, devisees and creditors, all have interests in the provisions of the will which cannot be denied by the desire of the proponent of the will to withdraw it from probate. The state is especially interested, since in many instances the amount collectible for taxes varies in accordance with the provisions of the will. When anyone files a petition for the probate of an alleged will he institutes a proceeding in rem and the court thereupon becomes vested with jurisdiction to determine whether the proposed will has been properly executed and, if it be found valid, to settle the affairs of the estate in accordance with its provisions. Neither the proponent of a will nor a party filing a contest to the petition for probate can divest the court of its jurisdiction to settle the issues presented by the petition. A petitioner cannot suppress a will before it is offered for probate, nor can he bring about the same result by withdrawing his petition after the will is offered for probate. In re Glover's Estate, 104 Neb. 151, 175 N.W. 1017, at page 1019; In re Hinton's Will, 180 N.C. 206, 104 S.E. 341, 345; In re Tresidder's Estate, 70 Wash. 15, 125 P. 1034, 1037; In re Lasak's Will, 131 N.Y. 624, 30 N.E. 112, 113.

[7] Following the usual procedure the court made and filed its findings of fact and conclusions of law, followed by the written order of April 20. If the order of March 20 was, as is contended by appellant, a final determination of the subject-matter, it is apparent that he could not be aggrieved by the signing of the later order, which did not alter the effect of the minute order previously made.

The orders are affirmed. Respondent shall recover costs on appeal from appellant.

We concur: MOORE, P. J.; McCOMB, J.




38 Cal.App.2d 321

## GENERAL v. ANTHONY et al.

Civ. 11343.

District Court of Appeal, First District, Division 2, California.

April 4, 1940.

**Limitation of actions ⇐146(3)**

**A written extension of time for payment of note secured by mortgage, signed by mortgagor alone, and based upon an oral agreement between mortgagor and mortgagee, was a "renewal" of note and mortgage within statute, and hence action on note and mortgage filed within four years of extended date was not barred by limitations. Civ.Code, §§ 1091, 2922; Code Civ.Proc. § 337.**

See Words and Phrases, Permanent Edition, for all other definitions of "Renewal".

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by G. W. General against Ira G. Anthony and another on a note secured by mortgage upon realty. From judgment for plaintiff, the defendants appeal.

Affirmed.

Derthick, Cusack & Ganahl, of Los Angeles (Herbert Ganahl and John S. Marshall, both of Los Angeles, of counsel), for appellants.

Entenza & Gramer, of Los Angeles (Orris R. Hedges, of Los Angeles, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff sued upon a note secured by a mortgage upon real property and had judgment. We copy the statement of facts from appellants' brief: "On July 1, 1926, Mr. and Mrs. Anthony executed a note for $2250.00 to W. E. Mabee and Grace W. Mabee, husband and wife, as joint tenants. Said note became due on July 1, 1929. Prior to that date the note and mortgage were assigned to the Pan-American Bank of California as security for a loan obtained from it by the Mabees. On June 14, 1929, a few weeks prior to maturity of the note, the defendants and appellants requested a two-year extension of both the note and mortgage. An agreement was drawn up and signed by Ira G. Anthony and Lola M. Anthony. W. E. Mabee never signed the agreement. Grace W. Mabee did not sign the agreement until January 21, 1935, six months before the institution of this suit of foreclosure of the mortgage. The agreement was never signed by the Pan-American Bank of California who, on June 14, 1929, was the owner and holder of the note and mortgage. (Clk. Tr., p. 1.) The action was filed June 15, 1935. * *"

Appellants' first ground of attack is that the action is barred by section 337 of the Code of Civil Procedure because the extension agreement was not properly executed, and because there was no proof of an oral agreement to extend. Appellants are in error in their conception of the record. Evidence was received going to prove that, prior to the maturity of the note, the parties had orally agreed to the extension, that it was accepted by the mortgagee after the mortgagors had executed it, that the latter accepted and retained the benefits of the extension of time given by the oral agreement, and that this agreement had thus become fully executed before suit was commenced. The trial court's finding that the terms of the proposed extension were fully accepted by the payee is supported by evidence from appellants themselves—one testifying "the bank agreed it (the extension) would be two years", the other, "I think it was settled in our mind it had already been signed and settled." The proposal thus became a valid oral agreement to extend the loan and the time of payment to July 1, 1931, and the writing executed by the mortgagors was given as an affirmance of the oral understanding and was in full harmony with it.

There is just one question of law involved in the appeal—whether the time of payment of a note secured by mortgage may be extended by a writing signed by the mortgagor alone when based upon an oral agreement made by the mortgagor and the mortgagee.

Section 2922 of the Civil Code reads: "A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property."

Section 1091 of the same code provides: "An estate in real property * * * can be transferred * * * or by an instrument in writing, subscribed by the party disposing of the same * * *."

The written extension signed and acknowledged by appellants before a notary recites that the extension was given "by mutual agreement". The trial court found it was accepted by the mortgagee and the guarantors. The appellants concede that the written agreement was executed with the formalities required by the code sections above cited. They also concede that these requirements are satisfied by a writing subscribed by the mortgagor alone if the writing follows a mutual agreement to extend. The case thus comes squarely within the rule stated in 18 California Jurisprudence, page 154, that such a writing is a renewal of the note and mortgage within the meaning of the code sections. Early cases adopting this rule, to which we have found none to the contrary, are German Savings etc. Society v. Hutchinson, 68 Cal. 52, 8 P. 627; Moore v. Gould, 151 Cal. 723, 727, 91 P. 616.

A general attack is made on the other findings as a whole without division of subject matter or text. We may assume that there may have been error in all these findings, other than those mentioned herein, but such assumption would not change the result. The proof of the mutual agreement, with the appellants' intent to be bound irrespective of other signatures, is sufficient to sustain the judgment.

Judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

38 Cal.App.2d 324

**LANDIS et al. v. GRIMES et al.**

**Civ. 11344.**

District Court of Appeal, First District, Division 2, California.

April 4, 1940.

**1. Executors and administrators ⇐509(1)**

Legatees were not entitled to sue in equity to set aside as fraudulent an order of the probate court approving executor's first account, of which legatees did not have knowledge until it was too late for them to appeal or to seek correction of order, where complaint showed that after approval of first account current, legatees filed a contest to second account current, and to final account and also a petition to remove executor, all of which were overruled since legatees had a plain and speedy remedy against executor in the probate court they had exercised. Civ.Code, § 3001 et seq.; Code Civ.Proc. § 473.

**2. Executors and administrators ⇐509(11), 514**

Although an order of the probate court approving a first account current could not be disturbed because no appeal was taken therefrom within time allowed, probate court had power to surcharge later accounts of executor for fraudulent conversion of estate at a time prior to approval of first account current and to direct the executor to recover portion of estate fraudulently converted and to account therefor in his later accounts. Code Civ.Proc. § 473.

**3. Executors and administrators ⇐510(9)**

Reviewing court in determining whether plaintiffs who were denied relief in action to obtain equitable relief against an order approving a first account current of an executor had an adequate remedy in the probate court, and hence were precluded from resorting to a court of equity, must assume that plaintiffs appealed from subsequent orders of probate court approving executor's second account current and final account and refusing to remove executor.

---

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ruth Landis and others against Earl Grimes and J. H. Flatt to obtain equitable relief against orders made in a proceeding in probate. From an adverse judgment, plaintiffs appeal.

Affirmed.

Walter M. Campbell, Jr., and Walter M. Campbell, Sr., both of Los Angeles, for appellants.

Wilton W. Webster, of Pasadena, for respondents.

STURTEVANT, Justice.

In an action brought to obtain equitable relief against certain orders made in a proceeding in probate, the trial court sustained a demurrer, without leave to amend, to the plaintiffs' second amended complaint. From the judgment entered in favor of the defendants, the plaintiffs have appealed.

For some time prior to his death W. E. Flatt was a stockholder in, and president of, the First National Bank of Lamanda Park. He owned 142 shares of the 250 shares issued and outstanding. The defendant Earl Grimes was the executive vice-president of the bank. On July 10, 1934, Flatt died testate. The defendant was appointed executor of the decedent's will and the estate was administered, distributed, and the executor was discharged. The legatees and devisees of the decedent claimed the executor committed certain acts of fraud. They commenced two separate actions in equity. This one was brought against the executor and his bondsmen. The other action was brought against the bank. In the latter action the trial court sustained a demurrer to their second amended complaint but its judgment was reversed. Landis et al. v. First National Bank, 20 Cal. App.2d 198, 66 P.2d 730. Reference is made to that case for the facts which are there fully set forth. The plaintiffs assert the allegations of the complaint in the latter suit were the same as in the present one "* * * except that in this complaint certain acts of extrinsic fraud in procuring an order of the probate court approving the executor's account and report, wherein this sale by the pledgee was referred to, are alleged." The defendants do not controvert that statement but contend the two are not "companion cases". As we see the facts, the distinction is immaterial in determining the merits of this appeal.

The plaintiffs earnestly press their allegations of fraud which they had also alleged in the Landis case. The defendants in a long brief seek to belittle said acts. But

it is sufficient to state that we are not inclined to criticize or disapprove any part of the decision in Landis v. First National Bank, supra, and we are not inclined to hold the plaintiffs' allegations of actionable fraud are deficient.

However, the defendants contend the complaint is fatally defective in an attempt to state a cause of action. They show the plaintiffs' complaint does not show that they have no plain, speedy and adequate remedy but it does show they have such a remedy. In that connection they call to our attention the following facts.

The decedent died May 6, 1932. In his will he named several legatees, some of whom resided in California while others resided in Minnesota and Montana. On June 2, 1932, letters testamentary were issued to the defendant Earl Grimes. At the time of his death the decedent owned 142 shares of the issued and outstanding stock of the First National Bank of Lamanda Park and he had pledged 137 shares thereof to Citizens Commercial Trust and Savings Bank of Pasadena to secure two promissory notes in the total sum of $11,077.25 principal and interest. He had also deposited with the pledgee 200 shares of the capital stock of Montana Life Insurance Company as additional collateral. On March 16, 1933, the defendant Grimes caused the last-mentioned stock to be sold and the proceeds applied on the indebtedness of the deceased to the pledgee. At about the same time he caused his agent to buy and the pledgee to sell the said 137 shares of stock in the First National Bank for $25 per share. Said transaction was had in the name of said agent and the stock was by the First National Bank sold in parcels to purchasers found and selected by the defendant for $250 per share. The surplus so received was paid into the treasury of said bank. The pledgee accepted the $25 per share, applied the proceeds pro rata on the balance remaining due on the notes it held, and was given a lien on other assets of the estate for the balance remaining payable to it. The sale of the pledged stock was conducted by the pledgee as provided in the Civil Code, sec. 3001 et seq. No notice thereof was given to the legatees and no order was asked for or given by the probate court before the sale was had. No legatee had notice of the transaction. On April 14, 1933, said sale was reported to the probate court. At that time the defendant Grimes filed his first current account and as a part thereof reported said sale. On May 9, 1933, the account was approved. The legatees knew nothing about said report until January, 1934. At that time it was too late for them to appeal or to make a motion under section 473, Code of Civil Procedure. Later the defendant filed his second current account. In due time the plaintiffs filed a contest seeking to surcharge the defendant's first current account and to have the defendant removed. A demurrer was sustained to the contest and the petition for removal was denied. The record does not show whether an appeal was taken. On June 2, 1936, the defendant filed his final account and a petition for distribution. The plaintiffs filed a contest of the account and again asked the probate court to surcharge the account of said defendant Grimes. Said contest was overruled and the account was settled and the petition for distribution was granted June 22, 1936. The record does not show an appeal was taken from either order. The plaintiffs pray judgment that the order dated May 9, 1933, settling said first account current, be vacated and that they have judgment against defendant Grimes for $30,825, or so much as each legatee is entitled to receive as legatee under said will.

[1-3] Having called to our attention the foregoing matters the defendants say: "It thus appears that, after the settlement and allowance of the first account current in which the item respecting the stock was first reported, plaintiffs have been heard by the probate court in three separate contests over the same subject-matter: First, their contest to the second account current; second, their petition to remove the executor; third, their contest to the final account. Now, these facts just summarized, in and of themselves, conclusively dispose of the contentions of the plaintiffs. They have no standing in this court, regardless of whether the complaint does or does not contain allegations sufficient in form to charge extrinsic fraud. The adverse decisions of the probate court upon their respective contests are, in full legal effect, res adjudicata." Those facts are alleged in the plaintiffs' second amended complaint. It is therefore clear the plaintiffs not only had a plain, speedy, and adequate remedy in the probate court, but they have exercised such remedy. Conceding, as claimed, that the order settling the first account current may not be disturbed, nevertheless the

probate court had power to surcharge the later accounts and, if any portion of the estate was being fraudulently converted, to direct the executor to recover it and account therefor in his later accounts. Estate of Eilert, 131 Cal.App. 409, 21 P.2d 630; Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 757, 758, 37 P.2d 69. It thus appears the plaintiffs have had their day in court. If they were not satisfied with the judgments and orders made in the probate court they had the right to appeal and we must assume they have appealed. It is obvious therefore that they may not resort to a court of equity. Doran v. Sherman, 18 Cal.App.2d 479, 64 P.2d 442, and authorities there cited.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




38 Cal.App.2d 276

**In re DOBKIN'S ESTATE.**

**KLEINBERG v. DOBKIN et al.**

**Civ. 12438–S.**

District Court of Appeal, Second District, Division 1, California.

April 2, 1940.

Hearing Denied May 31, 1940.

**1. Executors and administrators ⇐236**

An order approving claims against decedent's estate after hearing, of which statutory notice was given, on executrix' verified petition for permission to withdraw her rejections of such claims and approve them, was properly made, so as to authorize approval of claims on final accounting of administrator with will annexed. Probate Code, § 718.5.

**2. Limitation of actions ⇐46(2)**

Claims against decedent's estate for sums which decedent promised to repay claimant, who advanced them to decedent, were not barred by statute of limitations, in view of statements in claims that amounts thereof were to be paid on sale of hotel, which was not sold before testator's death, but during administration of estate

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tem.

In the matter of the estate of Raphael Louis Dobkin, deceased. From an order and decree of final distribution, entered after hearing on a petition for approval of the final account of Samuel Dobkin, administrator with the will annexed of the estate, and for an order of distribution, Rose Kleinberg, an objecting creditor, appeals.

Affirmed.

Harry Sherr, of Los Angeles, for appellant.

Joseph Sokolow, of Los Angeles, for respondent administrator.

Benjamin, Lieberman & Elmore, of Los Angeles, for respondent creditors.

YORK, Presiding Justice.

This is an appeal by an objecting creditor from an order and decree of final distribution entered after hearing had by the court upon a petition for approval of the final account and for order of distribution, to which petition the said objecting creditor as a creditor and person interested in the estate interposed objections to the approval of the final account and to a decree being entered in accordance with said petition.

The basis of the objection was that the estate was insolvent and that the petition for final distribution requested the approval of two claims which had been filed in the course of administration by the two sons of decedent by a former marriage, to-wit: Rubin Dobkin for $2,055.42 and Lazarus Dobkin for $2,701. These claims were duly verified in the usual form and were based upon an alleged promise of decedent to repay sums of money advanced by said sons to the decedent, which sums, it was alleged, he promised to pay upon the sale of a certain hotel property. This property was not sold during the lifetime of decedent, but was sold in the course of administration of his estate.

The claims were first rejected by the executrix of the said estate, who thereafter resigned and was succeeded by one Samuel Dobkin, as administrator with the will annexed, who in turn filed the final account and report and petition for distribution herein. After the disallowance of the claims by the executrix, suits were filed by the claimants against the said executrix who filed answers therein. Thereafter, the executrix petitioned the court for permis-

sion to approve the said claims thus sued upon. Said petition was duly verified and filed and came on regularly for hearing after notice was given as provided by law, and the court on July 28, 1938, granted the same and both claims were thereupon approved. No attack of any kind was made upon said order, no petition for a rehearing was made, and no appeal was ever taken therefrom.

The question now before this court is whether or not, upon the settlement of the final account of the administrator with the will annexed, it was proper for the probate court to order distribution of the estate decreeing the two claimants to be in the same creditor class as the objecting creditors Mrs. Rose Kleinberg, and Mrs. Kate Noak, whose claim by reason of the approval of said account was reduced to the sum of $307.83, their original claim having been allowed and approved for the sum of $1,340.20. The claim of respondent Rubin Dobkin was reduced to the sum of $472.06, and Lazarus Dobkin's claim was reduced to $620.35, these sums apparently being based on a pro rata distribution of an insolvent estate.

It is the contention of appellant, as it appears from her brief filed herein, that the two creditors' claims should not have been included in the final account and petition for distribution, and that the court's decree approving the same is erroneous and should be reversed. In other words, the sole question for consideration is whether the court had authority to approve the two claims which had been first disallowed and thereafter approved by the court upon petition of the executrix after suit had been filed thereon.

[1] With respect to the objection that the disallowed claims cannot thereafter be allowed in the manner here followed, and that therefore they cannot be approved in the final account, the procedure followed complied with the requirements set forth in the case of Syler v. Katzer, 12 Cal.2d 348 at page 350, 84 P.2d 137, 119 A.L.R. 422. When the executrix petitioned the court for permission to withdraw her rejections and approve the claims, notice was given as provided by statute, and the order based on this verified petition presenting the facts to the court was properly made.

In the matter of Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567, a creditor filed a claim in an estate, the executrix took no action thereon and in due time the creditor commenced suit on said claim. While suit was pending the executrix filed a petition in the probate proceedings praying for an order permitting her to compromise the claim for somewhat less than the amount sued for in the action on the claim. This motion was granted. Upon appeal being taken by a person interested in the estate, who had objected to the motion, the court held (133 Cal.App. page 528, 24 P.2d page 568): "The * * *order was in effect no more than an approval of the claim for the reduced amount as agreed upon by the claimant and the administratrix. * * * There is nothing in the law which forbids further consideration by the estate's representative * * * and the court, if the right to recover thereon be not barred by statute [11 Cal.Jur., Executors and Administrators, sec. 379, p. 661]." Furthermore, section 718.5 of the Probate Code provides that an executrix with the approval of the court may compromise "any claim against the estate or any suit brought against the executor or administrator as such", and to obtain such approval the executor or administrator may file a verified petition with the clerk showing the advantage of the compromise.

This procedure was followed in the instant case, and even though the claim were not a good claim in itself and the approval of the executrix could not have been given after she had first rejected it, the authority for the court's action in the instant proceeding is directly based upon said section 718.5, supra. Although it is probably true that the order which was made approving the claim was not a final order, the time to make it final was at the time of the hearing on the petition for final account and for distribution thereunder. The cases cited by appellant do not cover a situation similar to the one here involved.

[2] With respect to the question of the statute of limitations which has been raised, the appellant has disregarded a statement in the claims that the amounts were to be paid upon the sale of the hotel in question, which hotel was not sold prior to the death of the testator, but was sold during course of administration of the estate. There is no merit in this point.

The decree settling final account and for distribution appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

38 Cal.App.2d 319

## PADILLA v. PADILLA.

Civ. 11341.

District Court of Appeal, First District, Division 2, California.

April 4, 1940.

**1. Appeal and error ⇐110**

An order denying motion for new trial was not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

**2. Trusts ⇐89(1)**

In suit for decree declaring and enforcing a resulting trust in an undivided one-half interest in a lot and improvements thereon, where plaintiff claimed that property was purchased by plaintiff and defendant jointly under agreement whereby each was to pay one-half of purchase price, evidence sustained judgment for plaintiff.

**3. Trusts ⇐79, 102(1)**

Where parties living together as man and wife purchased property jointly, each paying one-half of purchase price, and trustees, to whom property had been conveyed as security for payment of purchase-money note, reconveyed property by deed designating defendant as grantee and reciting that estate was conveyed to defendant as her separate property, and such recital was inserted without plaintiff's knowledge, and defendant subsequently refused to convey to plaintiff one-half of the property, a "resulting trust", rather than a "constructive trust", existed in plaintiff's favor.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust" and "Constructive Trust".

**4. Limitation of actions ⇐102(6), 103(2)**

Where defendant held title to real estate under circumstances leading to a resulting trust with respect to plaintiff's interest therein, the four-year statute of limitations did not commence to run until there was a demand for a deed by plaintiff or a repudiation of trust by defendant. Code Civ. Proc. § 343.

**5. Limitation of actions ⇐103(2)**

Where defendant held title to real estate under circumstances leading to a resulting trust with respect to plaintiff's interest therein, and there was no repudiation until May 30, 1936, a suit commenced by plaintiff on July 23, to obtain decree declaring and enforcing resulting trust as to plaintiff's interest, was not barred by limitations. Code Civ.Proc. § 343.

---

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Suit by Juan Padilla against Manuela Padilla for a decree declaring and enforcing an alleged resulting trust in an undivided one-half interest in a lot and improvements thereon, wherein defendant filed a cross-complaint to quiet title. From a judgment for plaintiff, defendant appeals.

Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

A. H. Foster, of Los Angeles, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendant to obtain a decree declaring and enforcing an alleged resulting trust in and to an undivided one-half interest in a lot and the improvements thereon situated in the city of Watts in the county of Los Angeles. The defendant filed an answer setting forth many denials and she also filed a cross-complaint to quiet title. The plaintiff answered the cross-complaint. The action was tried before the trial court sitting without a jury. After the case had been submitted the trial court announced its decision in favor of the plaintiff. Written findings of fact and conclusions of law were waived. Thereafter the defendant made a motion for a new trial. The motion was denied. She has appealed from the judgment and from the order denying the motion for a new trial, and has brought up a bill of exceptions.

[1] The order denying a motion for a new trial is not an appealable order and the appeal therefrom is dismissed.

The plaintiff and the defendant from 1923 until 1936 although not married lived together as husband and wife. To them one child, a daughter, was born. That child has been cared for by both parties as though born in lawful wedlock. On the 29th day of May, 1929, the plaintiff and defendant entered into an agreement to purchase the property in suit. As alleged by the plaintiff it was agreed by him and

the defendant that they should make the purchase jointly, that each should pay one-half of the purchase price, and that they should own the property jointly. The purchase price was $700. There was paid down in cash the sum of $50. The balance of the purchase price, $650, was payable in instalments $15 or more per month, including interest. The payment of said balance was evidenced by a promissory note. A deed was made to the purchasers, they executed a trust deed to secure the payment of the promissory note, and went into possession. After the payments had been made the trustees reconveyed the property. The deed designated the defendant as the grantee and recited that the estate was conveyed to her as her separate property. Both parties signed the promissory note and both parties signed the trust deed. The deed of reconveyance followed the language of the original deed in designating the grantee. The recital in each deed that the property was conveyed to the grantee as her separate property was inserted without the knowledge or consent of the plaintiff. No question of title arose until the 30th of May, 1936. At that time the defendant and the plaintiff had a quarrel, the plaintiff was, by the defendant, ordered out of the house at the point of a gun, and directed never to return. Before leaving the plaintiff asked the defendant to convey to him his half of the property in suit. She refused and thereafter this action was commenced.

[2] The defendant contends that the evidence is insufficient to sustain the judgment. She argues that the evidence shows she was in receipt of certain moneys sufficient to make the payments. That is so, but it is likewise true the plaintiff testified that he made payments of one-half of the instalments as they fell due and futhermore that he purchased and paid for materials and constructed additions to the house. The defendant introduced no evidence to the effect that the plaintiff did not make every payment he was bound to make under the agreement.

[3] In her next point the defendant claims that if any trust existed it was a constructive trust and not a resulting trust. The claim may not be sustained. The facts clearly show a resulting trust. Moultrie v. Wright, 154 Cal. 520, 523, 98 P. 257.

[4, 5] In her last point the defendant claims the action is barred by section 343, Code of Civil Procedure. That claim is also without merit. As shown above the transaction presents a resulting trust as distinguished from a constructive trust. The statute did not commence to run until there was a demand for a deed or a repudiation. Faylor v. Faylor, 136 Cal. 92, 68 P. 482. In the instant case there was no repudiation until the 30th day of May, 1936. The action was commenced July 23, 1936. It follows that the case was commenced in time.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.




38 Cal.App.2d 258

## PEOPLE v. NORTHCUTT.

Cr. 451.

District Court of Appeal, Fourth District, California.

April 1, 1940.

**1. Criminal law ⇐274**

The trial court has a wide discretion in granting or denying permission to withdraw plea of guilty and trial court's order thereon will not be disturbed except on a convincing showing that a defendant has been deprived of his legal rights, but mere fact that a defendant believed, or was led by his counsel to believe that he would receive a milder punishment by pleading guilty is not, in itself, sufficient to require granting of a request to change plea of guilty to one of not guilty.

**2. Criminal law ⇐274**

Trial court did not abuse its discretion in refusing to permit a change in plea of guilty to that of not guilty of offense of bringing embezzled property into the state, where defendant at time of plea of guilty was represented by counsel, no affidavits were filed or evidence introduced for purpose of supporting motion to change plea and statements made by defendant indicated his guilt. Pen.Code, § 497.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Eugene F. Northcutt was convicted of bringing embezzled property into the state of California, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant appeals from a judgment of conviction on a charge of bringing embezzled property, an automobile, into the state of California, in violation of the provisions of section 497 of the Penal Code.

[1] The sole ground of appeal is that the trail court abused its discretion in denying the appellant's request to be allowed to withdraw his plea of guilty and enter one of not guilty. The appellant relies upon People v. Schwarz, 201 Cal. 309, 257 P. 71, and People v. Grant, 97 Cal.App. 60, 274 P. 1005, 275 P. 838. In the first of these cases the court said that it was well settled that where on account of duress, fraud or other fact overreaching the free will and judgment of a defendant he is deprived of a trial on the merits, the court may, if a properly supported motion is seasonably made, grant him the privilege of withdrawing a plea of guilty and entering one of not guilty, but that "this exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes". [201 Cal. 309, 257 P. 73.] In that case it was held that it was the duty of the court to permit a change of plea where the defendant had made a full statement or confession to a district attorney in consideration of a promise of immunity and had entered a plea of guilty in reliance upon such an agreement, which had not been kept. A similar holding is found in People v. Grant, supra, where it also appeared that the defendant was not guilty of the charge set forth in the information and, if guilty at all, was guilty of a minor infraction of the Motor Vehicle Act. It is well settled that the court has a wide discretion in the matter of granting or denying permission to withdraw a plea of guilty and to substitute therefor a plea of not guilty, that such an order will not be disturbed except upon a strong and convincing showing that a defendant has been deprived of his legal rights, and that the mere fact that a defendant hoped or believed, or was led by his counsel to hope or believe that he would receive a milder punishment by pleading guilty is not, in itself, sufficient to require the granting of a request for permission to change a plea of guilty to one of not guilty. People v. Aseltine, 139 Cal.App. 768, 34 P.2d 830; People v. Annino, 11 Cal.App.2d 560, 54 P.2d 531; People v. Taylor, 21 Cal.App.2d 562, 69 P.2d 1025; People v. Smink, 105 Cal.App. 784, 288 P. 873.

[2] The appellant herein was arraigned in the municipal court of the city of San Diego on October 31, 1939, being then represented by an attorney. He entered a plea of guilty and the case was certified and remanded to the superior court for further proceedings. The case came up in the superior court on November 3, 1939, the appellant not then being represented by counsel. He was asked by the court if he was represented by an attorney and if he wanted an attorney, to both of which questions he answered "No". He then told the court "I'd like to change my plea to not guilty." When asked by the court his reason for this he replied: "I didn't understand it in the other court, I have never been in court before." The court stated that the showing was not sufficient, told the appellant that he had had a lawyer to advise him in the municipal court, and that he would not permit a change of plea on the showing then made. The court then asked the appellant if he desired to ask for probation, which the appellant did, and the matter was continued.

On November 24, 1939, and after the report of the probation officer was filed, the matter again came on for hearing, at which time the appellant was represented by his present counsel. His counsel stated that he understood the appellant had previously made a motion for permission to change his plea of guilty, which motion had been denied. The court stated that the appellant had been represented by counsel in the other court, and stated that he wanted to know why the appellant had changed his mind. No real attempt was made to furnish the information thus requested and no motion was then made for permission to change the plea, and no affidavits were filed or evidence introduced for the purpose of supporting such a motion or request. The court then proceeded to examine into the facts of the case, the record thereof consisting of twenty-five pages besides the report of the probation officer, which was considered by the court. The statements then made by the appellant indicate quite clearly that he was guilty of the offense charged. In the course of that examination the appellant stated that

when the matter came up in the municipal court he "talked to" two lawyers and that "one of them told me to plead guilty, the other one told me not to; they got together and said 'it would pay you to plead guilty' ", and that he thought both of these were his lawyers. Nothing further appears in the entire record which throws any light upon the question now raised. The court denied the application for probation and, after arraignment, pronounced judgment sentencing the appellant to confinement in the penitentiary.

A full and fair hearing was had as to the circumstances in connection with the original charge and also in connection with the application for permission to change the plea, even if it be considered that such a motion was renewed at the hearing on November 24, 1939.

No abuse of discretion appears and the judgment appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.




38 Cal.App.2d 328

## MORAN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 6439.

District Court of Appeal, Third District, California.

April 4, 1940.

**1. Pleading ⇐207**

Mere defects of uncertain or indefinite allegations of a pleading may be raised only by a special demurrer.

**2. Mandamus ⇐154(4)**

A petition for a writ of mandamus was sufficient as against a general demurrer to require the issuance of a commission to take testimony of a material witness residing in Illinois for use on a motion for new trial, even though petitioner did not affirmatively state that witness' evidence would be favorable to him, where petitioner, who had filed a cross-complaint for annulment in wife's divorce suit, alleged that wife was formerly married to witness, that he was still alive, and that she was never divorced from him, and it appeared without dispute that witness' evidence was not cumulative and that extraordinary diligence had been used to discover whereabouts of witness. Code Civ. Proc. §§ 2020, 2024.

**3. Marriage ⇐40(9)**

In absence of evidence to the contrary, the presumption of the validity of a final marriage consummated by means of a formal ceremony is superior to and controlling of the mere presumption that a prior marriage continues in force. Civ.Code, § 61.

**4. Marriage ⇐40(11)**

A person who challenges the validity of a subsequent marriage has the burden of proving not only the former marriage but also of showing that it has not been dissolved by the death of the absent spouse or by a decree of divorce or annulment. Civ. Code, § 61.

**5. Marriage ⇐40(10)**

The presumption of the validity of a final marriage consummated by means of a formal ceremony may be controverted by evidence that a former spouse of one of the parties is living and that neither a divorce nor an annulment of the former marriage was ever procured. Civ.Code, § 61; Code Civ.Proc. § 1961.

**6. Marriage ⇐11**

Under statute, the validity of a subsequent marriage depends on the facts and circumstances under which it was consummated, and whether the former marriage was actually dissolved. Civ.Code, § 61.

**7. Marriage ⇐40(10)**

In a divorce suit, evidence is competent to rebut the presumption of the validity of a final marriage consummated by means of a formal ceremony by proving, if possible, that the spouse to whom one of the parties was formerly married is actually living and that the prior marriage was not dissolved, and positive or direct evidence is preferable to indirect evidence or mere presumptions of law. Civ.Code, § 61; Code Civ.Proc. § 1963, subd. 26.

**8. Divorce ⇐137**

In a divorce suit, upon a satisfactory showing of due diligence and the assurance of proving by direct and positive evidence that the spouse to whom one of the parties was formerly married is actually living and is outside of the state and that the prior marriage was not dissolved, the issuance of a commission to take the testimony of the

spouse is required by statute. Civ.Code, § 61; Code Civ.Proc. §§ 1963, subd. 26, 2020.

**9. Depositions ⇐7**

Under statute providing that the testimony of a witness out of the state may be taken by deposition in any action at any time after the service of summons, the deposition may be taken for use on a motion for new trial as well as at any other stage of the case before its final determination. Code Civ.Proc. § 2020.

**10. Mandamus ⇐40**

Mandamus is the proper proceeding to require the issuance of a commission to take testimony out of the state. Code Civ.Proc. § 2020.

**11. Depositions ⇐2**

The statute authorizing the taking of depositions to be used in pending trials should be liberally construed to the end that a litigant in a pending action may be afforded a reasonable opportunity to procure available testimony in support of his cause. Code Civ.Proc. § 2020.

**12. Depositions ⇐37**

Though a trial judge should possess a sound discretion to grant or deny a motion for a commission to take testimony in another state to be used on a motion for new trial when there is a conflict of evidence with respect to the exercise of due diligence, where a prima facie showing of diligence has been established, in the absence of counter-affidavits or evidence to the contrary, a commission should issue. Code Civ. Proc. §§ 2020, 2024.

**13. Depositions ⇐9**

On an application which complies with statute authorizing the taking of the testimony of a witness out of the state by deposition, a court has no discretion to refuse to issue the commission to take testimony. Code Civ.Proc. §§ 2020, 2024.

**14. Courts ⇐209(2)**

Where no application was made to file an answer to a petition for a writ of mandamus in event that general demurrer should be overruled, the District Court of Appeal assumed that an allegation of further facts by respondent was not desired, and pursuant to court rule the court overruled the demurrer without leave to answer. Rules for the Supreme Court and the District Courts of Appeal, rule 26, § 3.

Petition by Arthur R. Moran for a writ of mandamus to require the Superior Court of Sacramento County to issue a commission to take the testimony of a witness residing in Waukegan, Ill., to be used on a motion for new trial pending in a divorce suit in that court.

Writ granted and court directed to issue commission as prayed for.

Johnson & Curtright, of Sacramento, for petitioner.

McAllister & Johnson, of Sacramento, and A. C. McClellan, of Hanford, for respondent.

PER CURIAM.

This is a petition for a writ of mandamus to require the Superior Court of Sacramento County to issue a commission to take the testimony of a witness residing in Waukegan, Illinois, to be used on a motion for new trial now pending in a divorce suit in that court. The sufficiency of the allegations of the petition is raised by a general demurrer only. No answer was filed, and permission to answer in the event that the demurrer should be overruled was not requested.

The petition recites in detail the proceedings which occurred in the suit for divorce between Irene E. Moran, as plaintiff, and Arthur R. Moran, as defendant. It is alleged that on motion of the defendant an interlocutory decree of divorce which was rendered against him on the ground of extreme cruelty was set aside, and he was permitted to, and did, file a cross-complaint in which he asserted that the purported marriage between himself and Irene was void because she was formerly married to Paul R. Hendricks, who is still alive, and from whom she was never divorced. The cross-complaint prays that Irene be denied a divorce and that Mr. Moran be granted a decree of annulment of their purported marriage under the provisions of section 82 of the Civil Code.

It is further alleged in the petition that the defendant in the divorce case continued, to the time of the second trial of that case, to exercise extraordinary diligence to locate the witness Hendricks, but that he was unable to discover his whereabouts, and was therefore forced to go to trial without the benefit of his testimony; that no evidence of a divorce between Irene and Mr. Hendricks was adduced at the trial except that

she testified she had neither seen nor heard from her former husband for several years, which raised the presumption under section 1963, subdivision 26, of the Code of Civil Procedure that he was dead.

Upon that evidence an interlocutory decree of divorce was again rendered March 4, 1940, against the defendant on the ground of extreme cruelty. It was further determined that the defendant should take nothing by his cross-complaint. He promptly served notice of intention to move for a new trial upon several grounds, including that of newly discovered evidence. In support of that motion, an affidavit was filed, in which it was averred that since the divorce case was determined the defendant discovered that Paul R. Hendricks, the former husband of Irene, is alive and that he now resides in Waukegan, Illinois; that he refuses to make an affidavit of his marital status with Irene; that after the exercise of extraordinary diligence he was unable to locate Hendricks until after the time of the decision in the divorce case, and he was therefore compelled to go to trial without his testimony, and that his evidence will not be cumulative, but on the contrary it is material and necessary to establish his marital status with the plaintiff, Irene, which is absolutely essential from which to determine the merits of that cause on the issue as to whether a divorce or an annulment should be granted. Based on that notice of motion for new trial and upon the affidavit of merits the defendant immediately served and filed his notice of motion, under sections 2020 and 2024 of the Code of Civil Procedure, for a commission to take the testimony of Paul R. Hendricks in Waukegan, Illinois. That motion was also supported by an affidavit reciting facts similar to those contained in the affidavit on motion for a new trial. All of said notices and affidavits are attached as exhibits to the petition in this proceeding. At the hearing of the motion for a commission to take testimony, both parties to the divorce suit were represented. Mr. Johnson, one of the attorneys for the defendant, was sworn and testified to similar facts. No counter-affidavits were filed in behalf of the plaintiff, and no evidence was adduced to rebut the showing made by the defendant. The fact that Hendricks is now living stands uncontradicted, and the record in the divorce proceeding is therefore devoid of evidence that Irene and Mr. Hendricks were ever divorced. Upon that showing the court denied defendant's application for a commission to take testimony. This petition for a writ of mandamus was then presented.

[1, 2] We are of the opinion the petition for a writ of mandamus sufficiently alleges facts requiring the issuance of a commission to take testimony of a material witness residing in another state under the provisions of sections 2020 and 2024 of the Code of Civil Procedure. The only defect relied upon is the presence of certain statements in the petition which may be deemed to be conclusions, and that the petitioner failed to affirmatively state positively that the evidence of the witness would be favorable to him. These may be deemed to be mere uncertainties. The demurrer is general in its nature. Mere defects of uncertain or indefinite allegations of a pleading may be raised only by a special demurrer. Barber v. Mulford, 117 Cal. 356, 49 P. 206; 16 Cal.Jur. 866, § 64. Clearly the petition shows the discovery of a material witness whose evidence is absolutely necessary to determine the issues raised by the cross-complaint of the marital status of the parties to the divorce proceeding. The presumption that Hendricks is not dead is uncontradicted. Irene testified that she never procured a divorce from her former husband. He is the only witness who can furnish evidence of their marital status upon which the determination of the issues of the divorce case absolutely depends. It appears, without dispute, that his evidence is not cumulative. The averments of extraordinary diligence to discover the whereabouts of the witness are not disputed. Under such circumstances it would seem to be a denial of the statutory right to a commission to procure the evidence of a material and necessary witness to determine an issue vital to a just and proper decision of a pending case to refuse the mandate which is prayed for in this proceeding.

[3-6] In the absence of evidence to the contrary, the presumption of the validity of a final marriage, which is consummated by means of a formal ceremony, is superior to and controlling of the mere presumption that a prior marriage continues in force. The burden of proof is on the person who challenges the validity of a subsequent marriage to prove not only the former marriage, but also to show that it has not been dissolved by the death of the absent spouse or by a decree of divorce or annulment. Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am.St.Rep. 180; 34 A.L.R.

464, note; 77 A.L.R. 729, note; 26 Cal.Law Rev. 270. That presumption, however, may be controverted by evidence that the former spouse is living and that neither a divorce nor an annulment of the former marriage was ever procured. Sec. 1961, Code Civ.Proc.; Ryder v. Ryder, 2 Cal.App. 2d 426, 37 P.2d 1069; Clendenning v. Parker, 69 Cal.App. 685, 231 P. 765. Section 61 of the Civil Code provides that:

"A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

"1. The former marriage has been annulled or dissolved. * * *

"2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid *until its nullity is adjudged by a competent tribunal.*" (Italics ours.)

It is evident from the language of the preceding section that the validity of a subsequent marriage depends upon the facts and circumstances under which it was consummated, and whether the former marriage had been actually dissolved.

[7, 8] It follows that evidence in a divorce suit is competent to rebut the presumption raised by section 61 of the Civil Code or section 1963, subdivision 26, of the Code of Civil Procedure by proving, if possible, that the spouse to whom one of the parties was formerly married, is actually living and that the prior marriage was not dissolved. Positive or direct evidence is preferable to indirect evidence or mere presumptions of law. The validity of the last marriage is absolutely dependent upon the facts sought to be established in this action. The nature of the decree which is proper to be rendered in the divorce suit depends upon the question as to whether the last marriage was valid or invalid. If it was valid it may be proper to render a decree of divorce. If it was invalid possibly a decree of annulment should be entered. Upon a satisfactory showing of due diligence and the assurance of proving by direct and positive evidence facts which are so vital to the determination of a pending suit, the statute appears to require the issuance of a commission to take the testimony of such a material witness.

[9] Section 2020 of the Code of Civil Procedure is unqualified in its declaration that:

"The testimony of a witness out of this state may be taken by deposition in the following cases:

"1st. In an action, *at any time after the service of summons,* or the appearance of the defendant."

Since the deposition may be taken "at any time" after the service of summons, it follows that it may be taken for use on a motion for new trial, as well as at any other stage of the case before its final determination. Section 2024 of the Code of Civil Procedure authorizes that deposition to be taken by either party to the action upon five days' notice by order of the court or a judge thereof.

[10-12] It has been held that mandamus is the proper proceeding to require the issuance of a commission to take testimony out of the state. San Francisco Gas & Elec. Co. v. Superior Court, 155 Cal. 30, 39, 99 P. 359, 17 Ann.Cas. 933; Levin v. Superior Court, 139 Cal.App. 693, 34 P.2d 832. The statute authorizing the taking of depositions to be used in pending trials should be liberally construed to the end that a litigant in a pending action may be afforded a reasonable opportunity to procure available testimony in support of his cause. Pollak v. Superior Court, 197 Cal. 389, 240 P. 1006. That opportunity, under some circumstances, might prevent a miscarriage of justice. It is true a trial judge should possess a sound discretion to grant or deny a motion for a commission to take testimony in another state, to be used on a motion for new trial, when there is a conflict of evidence with respect to the exercise of diligence. But when a prima facie showing of diligence has been established, in the absence of counteraffidavits or evidence to the contrary, it seems clear that a commission should issue. There was no showing of a lack of diligence in the present case.

[13] It has been repeatedly said that a court has no discretion, upon an application which complies with the statute, to refuse to issue the commission to take testimony. San Francisco Gas & Elec. Co. v. Superior Court, supra; Levin v. Superior Court, supra.

The respondent argues that since the petitioner has failed to positively assert that the evidence of Hendricks will be favorable to him or that it will show a dissolution of the marriage between him and Irene did not occur, it would therefore be a useless and idle act for the court to direct the issuance of the commission. That evidence appears to be as essential to the determination of the plaintiff's rights in that suit as it is to those of the defendant.

[14] Since no application was made to file an answer to the petition in this proceeding in the event that the demurrer should be overruled, we assume that an allegation of further facts on the part of the respondent is not desired. Pursuant to rule XXVI, section 3, of the Rules for the Supreme Court and the District Courts of Appeal, the demurrer is overruled without leave to answer.

The writ of mandamus is granted and the court is directed to issue the commission to take testimony as prayed for.




## GLICKMAN v. NEW YORK LIFE INS. CO.*

Civ. 6326.

District Court of Appeal, Third District, California.

April 1, 1940.

Hearing Granted May 29, 1940.

**1. Trial** ⇐388(4)

Court was not required to make finding as to fact which was stipulated.

**2. Insurance** ⇐388(2)

Where agent of insurer in response to a direct inquiry by insured takes advantage of insured's known ignorance of his rights under policy as respects payment of premiums and deliberately deceives insured by false statements or concealment, and insured is without means of reasonably informing himself of the falsity of such statements, insurer may be estopped from denying that premiums were waived. St.1935, p. 505, §§ 332, 335.

**3. Insurance** ⇐388(2)

As respects waiver, a policyholder should have right to rely on definite and positive statements of an authorized agent of insurer regarding provisions of policy, since agent should be deemed an expert and better qualified to interpret terms of policy than unskilled policyholder. St.1935, p. 505, §§ 332, 335.

**4. Insurance** ⇐388(1)

There are circumstances under which an insurer will be estopped by false declarations or conduct of its agents from denying that premiums have been waived, as where actual fraud is exercised which prevents insured from reading the policy. St.1935, p. 505, §§ 332, 335.

**5. Contracts** ⇐97(1)

Actual reliance upon false statements is not enough upon which to base rescission of a document, but injured party must have also had a legal right to rely on the statements, on theory that negligence and inattention to his own interest waives his right to complain of the fraud or misstatements of another.

**6. Contracts** ⇐93(2)
**Insurance** ⇐141(4)

Ordinarily, one is required to read a document in his possession or which he has signed affecting his own interests, before he may complain of having been deceived with respect to its clear and unambiguous terms, and as respects insurance policy such requirement may be inferred from provisions of insurance code. St.1935, p. 505, §§ 332, 335.

**7. Insurance** ⇐241

Insured was presumed to have knowledge of endowment policy provisions for disability benefits and waiver of premiums, and, notwithstanding his actual ignorance of such provisions, he had no legal right to rely on incorrect statement of agent of insurer, upon direct inquiry of insured two days before policy became delinquent and at a time when insured was disabled, that only thing insured could do was to surrender his policy; hence surrender of policy would not be rescinded for alleged mistake and fraud. St. 1935, p. 505, §§ 332, 335.

Appeal from Superior Court, Los Angeles County; G. P. Bullock, Judge.

Suit by Sol Glickman against the New York Life Insurance Company to rescind the cancellation of an endowment insurance policy on the ground that the cancella-

*For subsequent opinion see 107 P.2d 252.

tion was procured by mistake and fraud. From judgment for defendant, plaintiff appeals.

Affirmed.

Irving S. Baltimore, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit to rescind a written surrender of his twenty-year endowment insurance policy on the ground that the cancellation was procured by mistake and fraud. The policy contained a disability clause providing that the premiums would be waived by the company upon proof that the insured was permanently disabled. Upon application to the Los Angeles agent of the defendant for information regarding the privileges of the insured under his policy by means of which he might meet the payment of a premium which was about to become delinquent, the agent failed to inform him of his right to establish proof of disability and persuaded him to surrender his policy upon payment of $30. This is not a suit to establish disability benefits, but it is an equitable action to rescind the cancellation of the policy alleged to have been procured by constructive fraud or mistake.

February 23, 1923, the appellant, who was then twenty-one years of age, took out a twenty-year three thousand dollar endowment insurance policy with the New York Life Insurance Company. His semi-annual premiums of $78.48 were due February 23rd and August 23rd of each year with a provision for thirty days' grace in which to pay them. The policy contained a clause allowing the insured one per cent monthly upon proof of permanent disability, during the continuance of such disability, "effective upon receipt at the Company's Home Office, before default in the payment of premium". That section of the policy also provided that all premiums "falling due after approval of such proof of disability and during such disability" would be waived. For ten years and to the spring of 1933 all premiums were paid.

The appellant was engaged in the business of upholstering furniture. He moved from New York to Los Angeles on account of serious affliction which he incurred several years after the policy was issued. He acquired a bad condition of chronic arthritis which completely disabled him from working for a year or more before his premium became due in February, 1933. He was a Russian with slight knowledge of the English language, although he later learned to read the language. He had never read his policy and did not actually know that it contained the disability clause entitling him to $30 per month during permanent disability and a waiver of premiums while he suffered that incapacity. He also held another twenty-year $12,000 endowment policy with the same company, containing a similar disability clause, which he took out in 1926. In 1932 and during the spring of 1933, he was totally disabled from working, he owed taxes and other pressing obligations. He had no income or means with which to meet those debts. The premiums on his two policies were about to become delinquent. The national moratorium was in effect and he was unable to borrow money from the banks. He visited the office of the defendant insurance company in Los Angeles in January, 1933, and talked with Miss Bush, a representative of the company about raising some money on his policies to pay the premiums. He obtained no satisfaction from her. He again returned to the office for the same purpose on March 22nd, which was only a day or two before his premium on the $3,000 policy would have become delinquent. He was introduced to Eagan Brantigan, an agent of the company, whose duties included the collection of premiums and the obtaining of surrenders of policies. The appellant explained his physical and his financial condition to the agent, and asked him for advice as to how he might raise some money on his policies to meet his pressing obligations. He told the agent he was disabled and sick and asked him to figure out some way for him to pay his premiums. He said: *"I am disabled,* not feeling well and I can't do anything, I am not working and I simply haven't got any money. Now, can you figure out a way I can borrow some money here to pay my premium up? * * I have no means any more to borrow, * * the banks are closed, * * * scarcely can't get enough to get by to eat on; * * I don't know where I am going to borrow it."

That evidence is not contradicted except by the presumption that he knew the contents of his policy. Mr. Brantigan testified at the trial that he talked with the appel-

lant and took his written surrender of the $3,000 policy, but that he had no recollection of the conversation which then occurred between them. It was stipulated at the trial that the appellant was totally disabled for the period of time at least, since October 1, 1932.

We must assume the agent was familiar with the disability clause of the policy, yet he failed to suggest to the appellant that he might file proof of his disability and thereby procure $30 per month benefits, together with a waiver of premiums during such disability. He advised the appellant that *the only thing he could do was to surrender his policy.* He said, "If you will surrender the policy * * * you will get a few dollars out of it." He added, "You can't get cash unless you sign certain papers, because we are not allowed to pay out cash." Mr. Glickman then said if that was the only thing he could do he would have to surrender his policy. The agent thereupon wrote out a request on the part of the appellant for the surrender of the policy and another acknowledgment of request to cancel it, both of which he procured him to sign. The latter document contained the following language:

"Request is hereby made upon the special ground of extreme need, as herein below set forth, for a loan cash surrender value in connection with the policy indicated in the caption.

"(1) I am in need of the sum of $30.00.

"(2) The purpose for which I need such sum is to pay taxes—Bal. of surrender value to be applied in reduction of Loan on Pol. #9683352.

"I declare that the facts herein above set forth are true, to the best of my knowledge and belief."

The $3,000 policy was delivered to the agent on the following day. The $30 check was sent to the appellant April 7, 1933.

[1] Two physicians testified that the appellant was physically disabled from performing work after May, 1931. The respondent conceded that he was totally disabled during the entire period following October 1, 1932. Six months after the appellant was induced by the agent of the company to surrender his $3,000 policy, his chronic arthritis became so bad that on October 9, 1933, he consulted with Doctor Fred J. Barnet who was on the medical staff of the Jenkins Clinic in Los Angeles. After an examination the doctor told him "that his entire system was permeated with a chronic disease of erythema multiforma * * * scattered throughout his body, including his shoulders, arms, fingers, hands, feet and other parts of his anatomy, the same being due to a rheumatic condition". The doctor told him he should undergo "a series of diathermic treatments", which would cost a considerable sum. The appellant told him he was in straitened financial circumstances and could not pay for the treatments. Doctor Barnet asked him if he did not have life or health insurance providing for disability. He replied that he did not know. At the request of the doctor, the appellant brought to him his $12,000 insurance policy, which was examined. The appellant was then advised by the doctor, and for the first time learned, that his policy provided for one per cent of the principal sum during his disability and a waiver of all premiums during that period. He then consulted an attorney and after making demand upon the company, which was refused, separate suits were brought upon the two policies. The suit for disability benefits under the $12,000 policy was subsequently compromised. This suit to rescind the cancellation and surrender of the $3,000 policy was tried and judgment was rendered against the insured. The court found that the policy was voluntarily surrendered in consideration of a cash payment, with knowledge on the part of the insured that it contained the disability clause; and upon the contrary that he did not surrender it relying on the advice of the agent to the effect that there was no other course for him to pursue; that the agent was not guilty of fraud or concealment with relation to the procuring of the cancellation of the policy. The court failed to find that the insured was disabled at the time of and subsequent to the surrender of his policy. Since that fact was stipulated it was not necessary for the court to so find.

[2] Numerous authorities support the rule that an insurance company is estopped from asserting that its policy has lapsed for default in the payment of premiums which the insured fails to meet on account of false or fraudulent representations of its agent which the insured is entitled to rely upon. Rice v. California-Western States Life Ins. Co., 21 Cal.App.2d 660, 70 P.2d 516, and cases cited. On page 665 of 21 Cal.App.2d, on page 519 of 70 P.2d, of the opinion in the last-mentioned case it is

said: "It is well settled that where an insurance carrier, through its duly authorized representative, by means of false and fraudulent representations made under such circumstances that the insured might, and actually did believe and rely upon them, deceived the insured and thereby caused him to default in the payment of a premium, an estoppel would arise which would prevent the insurance carrier from asserting or enforcing a claim that the policies had lapsed."

We are persuaded that when an agent of an insurance company, who possesses the authority to bind the company, in response to a direct inquiry by an insured person takes advantage of known ignorance of his rights under the policy and deliberately deceives him by false statements or concealment, and the insured is without means of reasonably informing himself of the falsity of such statements, the company may be estopped from asserting that the premiums have been waived.

[3-5] Under the circumstances of this case we are of the opinion the appellant did not have a legal right to rely on the false statement of the defendant's agent to the effect that the only way he could prevent default in the payment of the premium on his policy which would become delinquent in two days from the time of his interview was to surrender his policy, for the reason that he was in possession of that instrument which refuted the agent's statement and provides in plain and unambiguous terms that the future premiums would be waived upon proof of his disability. There is no doubt the insured was then disabled and that he would have been entitled to disability benefits of $30 a month and relief from paying premiums while that disability lasted upon satisfactory proof of his physical condition. It may be true the agent's attention was not directly called to the claim that the petitioner was then disabled, although the inquiry contained a declaration to that effect. The record is undisputed that appellant was actually ignorant of the fact that he was entitled to disability benefits. In justice, a policy holder should have a right to rely on definite and positive statements of an authorized agent of an insurance company regarding the provisions of his policy, for the reason that representatives of the company which executes the instrument should be deemed to be experts in that regard and better qualified to interpret the terms of the document than an unskilled policy holder. There are circumstances under which a company will be estopped from denying that premiums have been waived by false declarations or conduct of its agents. For instance, where actual fraud is exercised which prevents an insured person from reading the document which is involved, the instrument should be rescinded. Simmons v. Ratterree Land Co., 217 Cal. 201, 17 P.2d 727; 12 Cal.Jur. 751; secs. 30, 31; 12 R.C.L. 359, sec. 113; 23 Am.Jur. 857, sec. 80. Actual reliance upon false statements is not enough upon which to base rescission of a document. The injured party must have also had a legal right to rely on the statements. That rule is based on the doctrine that negligence and inattention to one's own interest waives his right to complain of the fraud or misstatements of another person. It is often difficult to determine on particular facts whether fraudulent statements on one hand or foolish neglect upon the other should control the decision of a court. In the text which appears in 12 Ruling Case Law at page 360 it is said in that regard: "The policy of the courts is, on the one hand, to suppress fraud, and, on the other, not to encourage negligence and inattention to one's own interests. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? * * * The courts, however, are not entirely in accord as to the circumstances under which fraudulent representations may be relied on, although it cannot perhaps be denied that negligence as a defense in cases of fraud has been in danger of being pushed too far. There would seem to be no doubt that while, in the ordinary business transactions of life, men are expected to exercise reasonable prudence, and not to rely upon others, with whom they deal, to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple minded or unwary. Again, where the means of obtaining information are not equal, the positive representations of the person who is supposed to possess superior means of information may be relied on. According to some decisions, the fact that a party who does not actually know the representations to be false has means of ascertaining their truth or falsity does not preclude him from relying on such representations. * * * According to others the party to whom a representation is made

must exercise reasonable diligence to detect the truth or falsity thereof where the parties stand on an equal footing and the matter is equally open to the inquiries of both parties."

Fair dealing inspires confidence. Large enterprises, which are constantly dealing with the frailties of credulous individuals, should be scrupulously careful to avoid taking an unfair advantage of their customers. We do not suggest that the agent in this case intended to deceive the appellant. But it is clear from the record that the appellant was actually deceived into surrendering his policy. It is possible that he could not have furnished satisfactory proof of his disability within the two days then remaining before the premium became delinquent. But that fact does not excuse the failure on the part of the agent to have made a full and fair statement upon direct inquiry of the insured, of his right to disability benefits. He was disabled and he was deceived. We are impelled to hold that the circumstances of this case do not afford relief from the cancellation of appellant's policy on account of his own neglect and delay.

[6] Ordinarily, one is required to read a document in his possession or which he has signed affecting his own interests, before he may complain of having been deceived with respect to its clear and unambiguous terms. Rice v. California-Western States Life Ins. Co., supra; Dale v. Dale, 87 Cal.App. 359, 370, 262 P. 339. Sections 332 and 335 of the California Insurance Code, St.1935, p. 505, so infer. Section 335 provides in that regard:

"Each party to a contract of insurance *is bound to know:*

"(a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated."

Section 332 reads: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, *and which the other has not the means of ascertaining.*"

However close it may be to the distinguishing line in protecting one who has been negligent in informing himself of the clear terms of an instrument in his own possession, we are of the opinion the Rice case, supra, determines this appeal adversely to the appellant. In this case Mr. Glickman had the actual possession of his policy for nearly ten years; periodically he had been afflicted with total or partial disability for several years; he could read the English language, but he failed to read his policy which contains clear and unambiguous provisions for disability benefits, and he made no inquiry regarding his right under the policy until a few days before the premium would have become delinquent.

In the Rice case, under circumstances very similar to those of the present case, the insured held two twenty-year endowment life insurance policies upon each of which he had borrowed, pursuant to their terms, the sum of $1,582.24. The premiums were due and payable on October 23rd of each year, with the privilege of thirty days' grace for the payment thereof. All previous premiums and interest had been paid. November 13, 1933, about one year before the policies matured and ten days before the premiums became delinquent, he owed $94.93 interest on each loan and the sum of $100.80 premium on each policy. On the last-mentioned date he went to the local Fresno office of the company and tendered an amount sufficient to pay the premiums due on the policies, but insufficient to also pay the interest then due. The local agent, Mr. Terry, erroneously told the insured that he could not prevent the policies from lapsing without paying both the premiums and the interest then due. The insured left, relying on the advice of the agent, and attempted to raise the balance of the sum demanded. The premiums were not paid and the policies therefore lapsed. The insured died soon after his interview with the agent. Suit was brought to recover the value of the policies, less the amount of the loans and accumulated interest. The defendant set up the lapsing of the policies for default in payment of the premiums. The plaintiff contended that the default of payment of premiums was waived by the constructive fraud of the agent in misinforming the insured contrary to the plain terms of the policies. Judgment was rendered against the company. The judgment was reversed on appeal, and the Supreme Court denied a hearing. Regarding the issue of a waiver of the premiums by the alleged fraud of the agent, and the right of the insured to rely on his erroneous statement, the court said: "We note that it is admitted that Mr. Rice had possession of his insurance policies. These policies

contained in clear and unequivocal language the statement that the insured might pay his premiums without paying his interest and thus continue his insurance in force for the periods we have already indicated. Under the rules just announced, Mr. Rice must be presumed to have known the contents of his policies, and, therefore, to have known that he had the right to pay his premiums without paying his interest. He could not have been deceived by the statement of Terry that it was necessary for him to pay about $400, the premiums and interest, in order to keep his policies in force. He is presumed to have known that such statement was false. Knowing it was false, he could neither have believed it to be true, relied upon it, nor have been deceived by it."

[7] For the foregoing reason we conclude that, since the appellant was in possession of his policy for nearly ten years, which policy declared his right to disability benefits in clear and unambiguous terms, and that he failed to read his policy, he was not entitled to rely on the incorrect statements of the agent, but on the contrary that he is bound by the terms of the instrument.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.




38 Cal.App.2d 188

**DAVIDSON et al. v. BURNS et al.**

**Civ. 12464.**

District Court of Appeal, Second District, Division 2, California.

March 28, 1940.

Rehearing Denied April 19, 1940.

See 101 P.2d 568.

**1. Municipal corporations ⇐885**

The budget, required by Los Angeles city charter to be prepared for fire and police pension fund, consists of statement of total estimated expenditures of pension department for all purposes and total estimated revenues thereof from other sources than taxation, not merely of items specifically enumerated in such charter provision, as word "budget" means financial statement of probable revenues and expenditures for ensuing year and words "consist of", as used in such provision, mean that expenditures listed in budget shall consist of items thereinafter enumerated. Los Angeles City Charter, § 186.

See Words and Phrases, Permanent Edition, for all other definitions of "Budget" and "Consist of".

**2. Municipal corporations ⇐885**

The rule that expression of one thing excludes another does not require holding that provision of Los Angeles city charter that fire and police pension fund budget shall consist of estimated requirements to pay specified pensions and administration expense limits budget items to those immediately enumerated thereafter. Los Angeles City Charter, § 186.

**3. Municipal corporations ⇐8**
**Statutes ⇐206**

In construing statute or municipal charter provision effect must be given, if possible, to each sentence, word and phrase thereof, and none of them should be considered unnecessary or surplusage, unless exigencies of situation, from consideration of statute or charter as whole, imperatively demand that some word, phrase or sentence be disregarded, rendered useless, or deprived of meaning.

**4. Municipal corporations ⇐885**

The rule that "the mode is the measure of the power" is not inconsistent with construction of Los Angeles city charter provision, requiring board of pension commissioners to prepare annual budget consisting of estimated requirements to pay specified pensions and administration expense, as requiring preparation of budget stating total estimated expenditures of pension department and total estimated revenues thereof from other sources than taxation, not merely items therein specifically enumerated. Los Angeles City Charter, § 186.

**5. Municipal corporations ⇐885**

Contemporaneous construction of city charter provision by administrative board and city council is not controlling, where clearly contrary to such provision, as in case of construction of Los Angeles city charter provision concerning preparation of fire and police pension fund budget as providing for mere statement of estimated expenditures by city board of pension commissioners and city council. Los Angeles City Charter, § 186.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by David A. Davidson and another against Robert L. Burns and others, members of and constituting the Council of the City of Los Angeles, and Walter B. Gibson and others, members of and constituting the Board of Pension Commissioners of such city, for a writ of mandate requiring respondent board to prepare a fire and police pension fund budget eliminating estimated receipts and levy a tax to meet requirements of such budget. Judgment for respondents, and petitioners appeal.

Affirmed as to respondent board, and reversed with directions as to other respondents.

Julius V. Patrosso, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., Leon Thomas David, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of respondents after the trial court sustained without leave to amend a general demurrer to a petition for a writ of mandate requiring respondent Board of Pension Commissioners to prepare a budget for the fire and police pension fund, eliminating therefrom estimated receipts and requiring respondent City Council to levy a tax to meet the requirements of said budget, petitioners appeal.

Section 186 of the charter of the city of Los Angeles since its amendment in 1933 reads as follows:

"Sec. 186. (1) For the purpose of providing and maintaining a fund to meet the payments of demands drawn for the payment of pensions and the expense of said Department of Pensions a fund is hereby created, to be known as the fire and police pension fund.

"(2) The Board of Pension Commissioners shall, annually, prepare a budget consisting of the estimated requirements for the next succeeding fiscal year to pay and discharge (a) disability pensions, (b) widows' pensions, (c) minors' pensions, (d) dependents' pensions, and (e) administration expense.

"(3) In addition to the foregoing there shall be included in said budget a sum equal to four per centum of the estimated total payrolls of the Fire and Police Departments for those members of the said departments included within the pension provisions of this article, for the next succeeding fiscal year.

"(4) In the event that all payments made and to be made from said fire and police pension fund during any fiscal year shall exceed the total sum paid into said fund from all sources as hereinafter provided, then, and in that event, in addition to all sums heretofore provided to be included in said budget there shall be set up therein a sum equal to the difference between the amount of moneys paid from said fund and all moneys received into said fund during said fiscal year.

"(5) For the purpose of providing funds to meet the budget of said fire and police pension fund as hereinabove described the City Council shall levy annually a tax clearly sufficient to provide the total amount of all items in said budget.

"(6) There shall be paid into said fire and police pension fund the following moneys, to-wit:

"(a) All interest and earnings from the investment of said funds;

"(b) All contributions and donations to the Fire and Police Departments for services by any member or members thereof, except amounts of money donated to provide for any medal or permanent competitive award;

"(c) All fines imposed upon members of the Fire and Police Department for violations of rules and regulations of said departments;

"(d) All proceeds from the sale of unclaimed property;

"(e) All deductions from the salaries of the members of the Fire and Police Departments, as provided for in section 186½ hereof;

"(f) All moneys received from taxes levied and collected for the use of said fund, as hereinbefore in this section provided." (Numbers in parentheses preceding each paragraph added.)

[1] This is the question presented for determination:

*Does the budget required to be prepared by section 186 of the charter of the city of Los Angeles for the fire and police pension fund consist of and include only the items therein specifically enumerated or*

*does such budget consist of a statement of the total estimated expenditures of the department of pensions for all purposes and a statement of the total estimated revenues of the department from sources other than taxation?*

We are of the opinion that the budget required to be prepared by section 186 of the charter of the city of Los Angeles consists of a statement of the total estimated expenditures of the department of pensions for all purposes and a statement of the total estimated revenues of the department other than from sources of taxation. The word "budget" means a financial statement of the probable revenues and expenditures for the ensuing year. Webster's New International Dictionary, (1939) vol. I, 349; The Oxford English Dictionary, (1933) vol. I, 1156; Funk & Wagnalls The Practical Standard Dictionary, (1938) 161; Rowe v. Stanley County, 52 S.D. 516, 219 N.W. 122, 123; White v. Harrell, 236 App. Div. 206, 259 N.Y.S. 1, 3; Appalachian Electric Power Co. v. City of Huntington, 115 W.Va. 588, 177 S.E. 431, 433; Graves v. Purcell, 337 Mo. 574, 85 S.W.2d 543, 548.

Applying the foregoing definition to the word "budget" as used in section 186 of the charter of the city of Los Angeles, it is clear that the budget to be prepared by respondent Board of Pension Commissioners should consist of estimated probable revenues as well as expenditures, and that the words "consist of" as used in the budget mean that the expenditures listed in the budget shall consist of the items thereinafter enumerated.

[2, 3] Petitioners urge that the maxim, "The expression of one thing is the exclusion of the other (expressio unius est exclusio alterius)", requires us to hold that, since section 186 of the charter says the "budget" shall "consist of", it limits the items included in the budget to those immediately enumerated thereafter. This rule is inapplicable to the present case, for the reason that by applying it we would not be giving effect to the universally accepted meaning, as stated above, of the word "budget". This would be contrary to the established rule of construction of a statute or charter provision that, if possible, effect must be given to each sentence, word, and phrase thereof and that unless the exigencies of a situation from a consideration of a statute or charter as a whole imperatively demand that some word, phrase, or sentence thereof be disregarded, rendered useless, or deprived of meaning, no such word, phrase, or sentence should be considered unnecessary or surplusage. Estate of Garthwaite, 131 Cal.App. 321, 324, 21 P.2d 465.

[4] It is also argued that the rule, "The mode is the measure of the power", likewise compels us to adopt petitioners' view. This rule is not inconsistent with the construction which we have placed upon the charter provision in question.

[5] Finally petitioners claim that, since the Board of Pension Commissioners and City Council of the City of Los Angeles annually from the year 1932 to and including the fiscal year 1938–1939 construed section 186 of the city charter as providing for the mere statement of estimated expenditures, the rule of contemporaneous construction is applicable. This rule is not controlling where, as in the instant case, the construction placed upon sections of a charter is clearly contrary to the provisions of the city charter. People v. Sergel, 269 Ill. 619, 110 N.E. 124, 126; State v. City of Newark, 50 N.J.L. 126, 10 A. 881, 883.

As it is conceded by all parties to this proceeding that respondent Board of Pension Commissioners prepared and adopted a budget in accordance with the views expressed in this opinion, which budget shows a deficiency of $3,572 between budget requirements and estimated revenues from sources other than taxation, and as it is also conceded that the City Council has refused to levy a tax clearly sufficient to provide for this deficiency, the judgment as to respondent Board of Pension Commissioners is affirmed and the judgment as to the other respondents is reversed with directions to the trial court to issue a writ of mandate conforming to the views herein expressed.

We concur: MOORE, P. J.; WOOD, J.

38 Cal.App.2d 215

## SOARES v. CITY OF SANTA MARIA et al.

Civ. 2515.

District Court of Appeal, Fourth District, California.

March 29, 1940.

**1. Licenses ⇐34**

Where ordinance provided for arrest and prosecution of one soliciting without a license and chief law enforcement officer of city refused plaintiff the right to solicit without obtaining and paying for a license, plaintiff's payment for a license was an "involuntary payment", and could be recovered if the ordinance was unconstitutional.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Payment".

**2. Commerce ⇐67**

Where goods filling solicited orders were sent from another state to solicitor who opened the packages and delivered the goods to each customer, city ordinance requiring license for business of soliciting was not unconstitutional as placing an unlawful burden on "interstate commerce."

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

**3. Constitutional law ⇐229(1)**

Reasonable, natural, and intrinsic classification for the purpose of taxation may be made, but a classification based on the length of time a person has been in business in a given locality is unconstitutional as denying to some the "equal protection of the law" by giving to others in identical circumstances greater privileges and immunities.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

**4. Constitutional law ⇐230(4)**
**Licenses ⇐7(3)**

City ordinance providing for a license of $20 per quarter for a solicitor who has been in business at least one year but five times that amount for one who has been in business for less than a year, and providing for a refund of four-fifths of the larger amount at the end of one year if the solicitor stays in business for that period of time, is discriminatory and void as denying the "equal protection of the law" for making a distinction based on the length of time a solicitor is in business.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Ida C. Soares against the City of Santa Maria and others to recover $100 paid as a city license for soliciting. From judgment for defendants, plaintiff appeals.

Reversed.

Fred A. Shaeffer, of Santa Maria, for appellant.

Hurley T. Bailey, City Atty., of Santa Maria, for respondent.

MARKS, Justice.

This is an appeal from a judgment refusing plaintiff recovery of $100 paid as a city license, under the terms of a license ordinance of Santa Maria, permitting her to solicit and take orders for goods manufactured in Cincinnati, Ohio, and delivered in Santa Maria.

The ordinance provides for a license of twenty dollars per quarter for a solicitor who has been in business at least one year, but five times that amount for one who has been in business for less than that time. It also provides for a refund of four-fifths of the larger amount at the end of one year if the solicitor stays in business for that period of time. The penal paragraph of the ordinance makes soliciting without such license a misdemeanor for which the solicitor might be punished by fine or imprisonment, or both.

The evidence shows that Mr. Soares, husband of plaintiff who procured the license for her was told by the city marshal of Santa Maria that Mrs. Soares could not take orders and fill them without obtaining and paying for the license; that it would be enforced against her. He then paid the license. Mrs. Soares stayed in business for about four months.

Mrs. Soares thus explained her method of doing business. She solicited orders from door to door in Santa Maria. She sent the orders to Cincinnati, Ohio, where they were filled. These orders were sent by express and delivered to her in Santa Maria. She opened the packages containing the goods and filled the orders by delivering to each customer the goods ordered.

Three questions necessary for decision are presented: (1) Was the payment of the license a voluntary or involuntary act? (2) Did the ordinance place a bur-

den on interstate commerce? (3) Was the ordinance discriminatory and therefore unconstitutional?

[1] The ordinance provides for the arrest and prosecution of Mrs. Soares should she pursue her business without a license. The chief law enforcement officer of Santa Maria refused her the right to engage in her business without obtaining and paying for a license. Under similar circumstances it has been held that such payment was involuntarily made and could be recovered if the ordinance imposing the tax was unconstitutional and void. Trower v. City and County of San Francisco, 152 Cal. 479, 92 P. 1025, 15 L.R.A.,N.S., 183; Barker Bros. Inc. v. City of Los Angeles, 10 Cal.2d 603, 76 P. 2d 97; Home Tel. & Tel. Co. v. City of Los Angeles, 40 Cal.App. 492, 181 P. 100.

[2] Mrs. Soares relies on Real Silk Hosiery Mills, Inc., v. City of Portland, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982, and the many cases to the same effect, as upholding her argument that the ordinance places an unlawful burden on interstate commerce. While the rules announced in those cases are firmly established and may not be questioned, they are not controlling here. In those cases the orders were taken within the state of ultimate destination and forwarded to the manufacturer or distributor without the state. The goods ordered were shipped by the latter direct to the customer within the state where the orders were taken. The goods did not go into the hands of the agent or other representative of the shipper for redistribution but direct to the ultimate consumer. Therein lies the distinction between those cases and the instant case.

The case of Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257, and the many cases following it, are controlling here. In those cases the goods were shipped to an agent or other representative of the shipper in the state where the tax was imposed. They came to rest in the possession of the consignee and became a part of all of the property within the state which was subject to its taxation. When they so came to rest their journey in interstate commerce ended and they were subject to local taxation even though some of them might be disposed of for reshipment in interstate or foreign commerce.

As the goods in the instant case were delivered to Mrs. Soares in Santa Maria, and were by her delivered to her customers, the ordinance imposing the license did not place any unlawful burden on interstate commerce.

[3, 4] Is the ordinance discriminatory and therefore void in placing a greater tax on a person in business for less than one year than it imposes on another person who has been in the same business for longer than one year? An ordinance quite similar in purpose and effect was held void in the case of In re Fassett, 21 Cal.App.2d 557, 69 P.2d 865, 867, where it was said: "We are unable to see any natural, intrinsic or reasonable distinction between persons who have been engaged in that business at a particular location for a period of one year and others who have been thus established for a shorter period of time, perhaps only for 11 months, and 29 days. * * * Under the terms of this ordinance one who has been engaged in such a business on certain premises for the period of 1 year, without the payment of any fee and without complying with any regulations other than those that may have been provided for in previous ordinances, may proceed with his business * * *, no matter how large, which he has previously maintained and may, without fee or further regulation, obtain a permit for any increased number, and this without regard to the location of his business. On the other hand, one who is engaged in exactly the same sort of business, and who has complied with the same regulations as those imposed upon his favored competitor, but who happens to have moved his location within a year or to have established his business within that time, must, before he can operate or continue to operate, pay a fee of $25 and comply with additional regulations, with respect to his location and the manner in which his equipment is constructed, which are much more onerous and with which it would be difficult and expensive, if not impossible, to comply. The ordinance in question is so patently discriminating, as between persons of the same class, as to strongly suggest that it was so intended."

While the right to make reasonable, natural and intrinsic classifications for the purpose of taxation is well recognized, such a distinction cannot be based on the

length of time a person has been in business in a given locality. Where such a classification is attempted it denies to some the equal protection of the law by giving to others in identical circumstances greater privileges and immunities, which render the legislation unconstitutional and void. In re Weisberg, 215 Cal. 624, 12 P.2d 446.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.




## BANK OF CALIFORNIA, NAT. ASS'N, v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. *

Civ. 11283.

District Court of Appeal, First District, Division 1, California.

March 30, 1940.

Hearing Granted May 27, 1940.

**1. Prohibition ⇐27**

In prohibition proceeding to stay trial of action until all parties should be brought within court's jurisdiction, wherein respondents' answer and briefs did not intimate intention to cause dismissals to be entered as to absent parties defendant and counsel took a contrary position in oral argument, court must assume that no such action was contemplated or would have been taken.

**2. Specific performance ⇐106(1)**

In action for enforcement of agreement by testatrix and wife to devise their entire estates to named persons, wherein only the residuary legatee and the executor were served with summons, all parties shown by the complaint to own interests in the property and against whom plaintiff commanded personal relief were "necessary and indispensable parties", and hence court did not have jurisdiction to proceed with the trial, under equitable doctrine against litigation by piecemeal and multiplicity of suits. Code Civ.Proc. §§ 389, 1103.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary and Indispensable Parties".

**3. Specific performance ⇐86**

A suit to enforce an alleged promise to make a will has its origin in equitable principles, and hence must be tried and determined in conformity with equitable doctrines.

**4. Parties ⇐32**

A fundamental principle of equity jurisprudence is that equity will not permit litigation by piecemeal, and the whole subject matter and all the parties should be before the court and their respective claims determined once and forever.

**5. Equity ⇐39(1)**

Where equity court has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented.

**6. Parties ⇐50**

The enactment of statute governing bringing in of additional parties necessary to complete determination of controversy operated to continue in force substantially all the equitable doctrines against litigation by piecemeal and requiring adjustment of all differences between the parties. Code Civ.Proc. § 389.

**7. Parties ⇐51(4)**

A party is a "necessary and indispensable party" and must be brought in where a complete determination of the controversy cannot be had without his presence.

**8. Courts ⇐21**

The mere naming of a person as party defendant without any further attempt to bring him within presence of the court does not make him a "party" before the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

**9. Prohibition ⇐3(3)**

Writ of prohibition rather than appeal was proper remedy to prevent court from proceeding with trial where it lacked jurisdiction because necessary and indispensable parties had not been brought before the court and proceeding would violate rules against litigation by piecemeal and multiplicity of suits. Code Civ.Proc. §§ 389, 1103.

**10. Prohibition ⇐15**

An executor and residuary legatee who were made parties to action to enforce alleged agreement by testatrix to devise all her property to third persons were "persons

*For subsequent opinion see 106 P.2d 879.

beneficially interested" within meaning of statute authorizing institution of prohibition proceeding to prevent court from proceeding with trial without bringing other legatees before the court. Code Civ.Proc. § 1103.

See Words and Phrases, Permanent Edition, for all other definitions of "Persons Beneficially Interested".

11. Parties ⇐53
Prohibition ⇐5(3)

Where absent defendants are shown to be necessary and indispensable parties to complete determination of controversy, it is court's mandatory duty on its own motion to bring in the absentees before the court, and prohibitory relief will be granted if court proceeds with trial in violation of such duty. Code Civ.Proc. §§ 389, 1103.

PETERS, P. J., dissenting.

---

Proceeding by the Bank of California, National Association, as executor of the will of Sara M. Boyd, deceased, and another, against the Superior Court of the State of California, in and for the City and County of San Francisco, and one of the judges thereof, for prohibition to stay trial in suit to recover estate property on ground of agreement to make will disposing of such property.

Peremptory writ granted.

Pillsbury, Madison & Sutro and Myrick, Deering & Scott, all of San Francisco, for petitioners.

Mitchell Bourquin, Clinton L. Markley, George H. Cabaniss, Jr., and Daniel R. Shoemaker, all of San Francisco, for respondents.

KNIGHT, Justice.

This proceeding in prohibition grows out of the following factual situation: Sara M. Boyd, widow of Colin M. Boyd, died in June, 1937, leaving an estate valued at more than $200,000, which she disposed of by will. In July, 1937, the will was admitted to probate, and The Bank of California, National Association, was appointed executor. The dispositive clauses of the will created upwards of twenty cash legacies and bequests of jewelry and other articles of personal property, and the residue was bequeathed to St. Luke's Hospital of San Francisco. Four of the beneficiaries named by the testatrix were religious or charitable institutions, and the rest were individuals. On October 14, 1937, Bertha M. Smedley, a niece to whom the testatrix had bequeathed $10,000, instituted a suit to recover all of the property belonging to the estate, based on allegations to the effect that in 1910 Mrs. Boyd and her husband (who died in 1912) agreed to bequeath and devise their entire estates to the said Bertha M. Smedley and her sister (who predeceased Mrs. Boyd) or to the survivor of them. Having directed her suit against all of the property disposed of by the will, the plaintiff joined as parties defendant to the suit all of the beneficiaries named in the will and the executor. The relief prayed for was that a decree be entered in plaintiff's favor establishing said agreement and decreeing thereupon that the plaintiff is the owner and entitled to the distribution of the entire estate of the decedent after the payment of just debts and expenses of administration; "that her title thereto be quieted, and that the defendants, and each of them, be ordered and decreed to execute to plaintiff good and sufficient deeds granting and conveying to said plaintiff all of the real and personal property, and upon failure so to do, the clerk of this court execute under seal of this court such an instrument, and for such other and further and definite relief as may be just and equitable in the premises". However, only the residuary legatee and the executor were served with summons; and on November 15, 1939, the cause came on for trial upon the issues raised by the amended complaint and the separate answers filed thereto by the residuary legatee and the executor. No appearance was ever made by any of the others named as parties defendant; and at the opening of the trial the answering defendants moved, under the authority of section 389 of the Code of Civil Procedure, for an order to bring in the other parties defendant, and to that end that summons be served upon them. Among the grounds urged in support of the motion were that a complete determination of the controversy presented by the suit could not be had without the presence before the court of the other parties defendant; that they were indispensable parties to the action; that a trial of the cause without first having acquired jurisdiction over them would engender a multiplicity of suits; and that therefore, without having said absent parties defendant before it, the court was without jurisdiction to proceed with the trial of the

cause. The motion was denied; and thereupon, without making any further order respecting the parties defendant who had not been served with summons, the court directed that the trial proceed; whereupon the answering defendants joined in an application for a writ of prohibition to stay the trial until all of said parties were brought within the jurisdiction of the court.

[1,2] In neither respondents' answer to the petition for the writ, nor in the briefs filed in their behalf, is it intimated that it was or is the intention to cause dismissals to be entered during the course of the trial or at the conclusion thereof as to any of the absent parties defendant; and because of the adverse position taken by counsel for respondents at the time of oral argument before this court with respect to the matter of the dismissal of the absentees, it must be assumed for all the purposes of this proceeding that no such action was contemplated or would have been taken. We are of the opinion that in the state of the record as it stood at the time of the denial of the motion the trial court was without jurisdiction to proceed with the trial.

[3-5] As pointed out by the authorities dealing with the subject, the right to maintain a suit to enforce an alleged agreement or promise to make a will has its origin in equitable principles, the theory upon which the right is based being that if such an agreement or promise is established a court of equity may, under special circumstances, impress a trust upon the property of the estate in favor of the promisee, decree that the heirs or beneficiaries to whom the estate otherwise would have descended by will or by the law of succession take title thereto merely as trustees for the promisee, and compel such disposition of the property as will carry out the intent of the agreement. McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Stewart v. Smith, 6 Cal.App. 152, 91 P. 667; Rundell v. McDonald, 62 Cal.App. 721, 217 P. 1082. Therefore such a suit must be tried and determined in conformity with equitable doctrines (Stewart v. Smith, supra); and one of the fundamental principles of equity jurisprudence is that a court of equity will not permit litigation by piecemeal. The whole subject-matter and all of the parties should be before the court, and their respective claims determined once and forever. O'Connor v. Irvine, 74 Cal. 435, 16 P. 236, 239. In the case last cited the court goes on to say: "Generally, in suits between cestuis que trust and trustees, all the parties interested should be before the court. Barb. Parties, 439, 442, 444. If the necessary parties to a full determination are not before the court it is the duty of the court on its own motion to order them brought in; and this, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment. [Citing cases.]" The same doctrine was declared in many of the other earlier cases. For example, in McPherson v. Parker, 30 Cal. 455, 89 Am.Dec. 129, the court said: "It is the constant aim of Courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and, also that future litigation may be prevented. * * When all the parties are before the Court the whole case may be seen, but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." Hence the common expression that "a court of equity in all cases delights to do complete justice, and not by halves". Newhall v. Bank of Livermore, 136 Cal. 533, 69 P. 248, 250. Another of the earlier cases which may be cited to the same effect is Wilson v. Castro, 31 Cal. 420, wherein the court after restating the doctrine last above quoted continued as follows: "For this purpose all persons materially interested, either legally or beneficially in the subject-matter of the suit, ought generally to be made parties thereto, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all. * * * There is a distinction made in some of the authorities between subject-matter of the suit and object of the suit, and it has been said that it is not all persons who have an interest in the subject-matter of the suit, but in general those only who have an interest in the object of the suit who are ordinarily required to be made parties. * * * The general rule on the subject may be stated to be that all are necessary parties who have an interest in the subject-matter which may be affected by the decree. * * This rule is founded in the principle of preventing future litigation and avoiding a multiplicity of suits by adjudicating upon the rights of all parties upon whom a de-

cree may or ought to operate." It is also a well-recognized rule that when a court of equity has acquired jurisdiction "for one purpose it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented". Newport v. Hatton, 195 Cal. 132, 231 P. 987, 995.

[6-8] By the enactment of section 389 of the Code of Civil Procedure the legislature continued in force substantially all of the foregoing equitable doctrines (Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445), the section being made to read in part as follows: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, *the court must* then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served." (Italics ours.) And in passing upon the question of the mandatory effect of said section the courts have definitely declared that "* * when the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be had without the presence of other parties,' such parties become necessary and indispensable parties, and the section is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in. If, nevertheless, it assumes to do so it may be subjected to the prohibitory writ quousque, that is to say, until the performance of a certain act, or the happening of a certain event". Ambassador Petroleum Co. v. Superior Court, supra [208 Cal. 667, 284 P. 447], citing Carter v. Superior Court, 176 Cal. 752, 169 P. 667, and Ash v. Superior Court, 33 Cal. App. 800, 166 P. 841; see, also, Morrow v. Superior Court, 9 Cal.App.2d 16, 48 P.2d 188, 50 P.2d 66. Some of the earlier decisions, in classifying parties to equitable proceedings, differentiate between so-called necessary but not indispensable parties, and necessary parties who are indispensable, but as will be noted from the language last above quoted, it is now well settled that a party is deemed to be a "necessary and indispensable party" and must be brought in where a complete determination of the controversy cannot be had without his presence. Moreover, it is held that the mere naming of a person as party defendant without any further attempt to bring him within the presence of the court does not make him a party before the court. San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379.

Here, as stated, the plaintiff Bertha M. Smedley by her suit is seeking to impress a trust upon the estate of the decedent as a whole, in which each of the parties defendant not served with summons admittedly has a substantial interest, and in addition she is asking that her title to the whole estate be quieted and that all named as parties defendant to the suit be directed to convey to her their respective interests, or upon their failure so to do, that conveyances to that end be made by the clerk of the court. In other words, plaintiff is demanding a decree which to all intents and purposes would operate as a judgment in rem against all property belonging to the decedent's estate and as a judgment in personam against all the parties defendant, directing them to convey their interests in said property to plaintiff. And such being the purpose and the scope of the suit, it would appear certain that under the decisions above cited all parties who are shown by the complaint to own interests in the property and against whom the plaintiff has demanded personal relief, are necessary and indispensable parties to a complete determination of the cause of action thus presented. Furthermore, it would appear equally certain that if a decree were rendered in plaintiff's favor in the present form of the action, without having the absentees properly before the court, it would injuriously affect their respective interests, because it would be subject to attack upon the ground of the failure to serve summons on all parties defendant against whom the decree was directed, and upon the annulment thereof as to the absentees on that ground the cause of action would stand open and undecided as to them, which would give rise at once to the question of whether the plaintiff might not thereupon serve summons on the absentees and prosecute the suit de novo against them, singly or collectively; or, if not annulled, it would, ostensibly at least, have some binding effect upon their interests without giving them their day in court. On the other hand, assuming that in the state of the record as it now stands, the cause should be decided adversely to plaintiff on the merits, the same question would remain

undetermined, namely, whether the plaintiff could not thereupon pick out one or more of the parties defendant upon whom summons had not been served and prosecute the suit de novo against them. And in any event, until there was a final determination of the question of the right of plaintiff to prosecute the suit de novo against the absentees, a decree in any of the forms above mentioned would stand as a cloud upon the title to those portions of the estate to which the absentees would be entitled to succeed under the will and constitute a bar to the final settlement of the estate.

[9] We think it apparent, therefore, that the trial and determination of the cause in the condition of the record as it now stands would not only contravene the established equitable doctrine forbidding litigation by piecemeal, but would injuriously affect the rights of the absent parties defendant, and necessarily engender a multiplicity of suits to ascertain and determine their rights under the decree and under the will; and that being so, the situation calls for the granting of prohibitory relief.

It is contended on behalf of respondent in opposition to the issuance of the writ that the interests of the residuary legatee are separable from those of the other beneficiaries, and that therefore plaintiff may properly proceed against the interests of the residuary legatee alone. Two cases, Rundell v. McDonald, supra, and Oles v. Wilson, 57 Colo. 246, 141 P. 489, are relied upon by respondents to support their contention. An analysis of those cases shows, however, that the factual situation in each is essentially different from the one now before us. In the former case the plaintiff, prior to the commencement of the trial, dismissed the suit as to all heirs having any interest in the property sought to be recovered except the single one against whom he was seeking the decree; whereas here plaintiff has in effect refused to dismiss as to the other parties having interests in the subject-matter of the suit, notwithstanding that without first having served summons upon them she is demanding a decree affecting their interests. And in the Colorado case the plaintiff sought to recover but one-third of the estate of the decedent and the suit was directed only against the interests of the residuary legatees, and they alone were made parties defendant to the suit; whereas here the suit is directed against the entire estate and all beneficiaries named in the will are made parties defendant to the suit, but only one, the residuary legatee, has been served with summons. If here it was plaintiff's purpose to proceed against the interests of the residuary legatee alone, she could have easily accomplished such purpose in the beginning, as was done by the plaintiff in the Colorado case, by confining the scope of her suit to the interests of the residuary legatee and making the residuary legatee alone the party defendant, or at the time of the hearing of the motion in question, as was done in the Rundell case, by dismissing as to all parties defendant except the residuary legatee. But she has declined to follow either of those courses, and insists on trying the cause against the interests of all beneficiaries, without first having acquired jurisdiction over any of them except the residuary legatee. That being so, it would be contrary to equitable doctrines to allow her to maintain the suit in such form as would leave open the question of whether she could prosecute the same against any of the parties defendant not served with summons, after having prosecuted it, either successfully or unsuccessfully, against the beneficiary upon whom summons has been served.

[10, 11] Further contention is made by counsel for respondents that prohibitory relief is not available to petitioners herein because, as respondents claim, neither is a "person beneficially interested" within the meaning of section 1103 of the Code of Civil Procedure. This contention is based upon the proposition that if the court has acquired jurisdiction to hear and determine the controversy between plaintiff and the petitioners, the latter may not complain of any injurious effect the trial and determination of the action may have upon the rights of others. As already pointed out, however, in the state of the record as it is brought before this court, the absentees are shown to be necessary and indispensable parties to a complete determination of the controversy presented by the amended complaint and the answers thereto, and it is well settled that where such is the case, it becomes the mandatory duty of the court of its own motion to bring in the absentees before the court (O'Connor v. Irvine, supra; Hutchins v. Security Trust, etc., Bank, 208 Cal. 463, 281 P. 1026, 65 A.L.R. 1059; Lake v. Dowd, 207 Cal. 290, 277 P. 1047); and that if the court fails to perform such mandatory duty and nevertheless proceeds with the trial, it does so without jurisdiction, and prohibitory relief will

be granted. Ambassador Petroleum Co. v. Superior Court, supra. The remaining point made by respondents is that petitioners' remedy is by way of appeal and not prohibition; but the negative answer to this contention is to be found in that part of the decision in the case last cited, to which reference has just been made.

Petitioners make the additional contention that the rendition of any decree in the present state of the record, without bringing in the absentees, would injuriously affect the rights of the executor by subjecting it to undue inconvenience and danger of financial loss; but in view of the conclusion reached on the controlling issues above discussed, it is unnecessary to consider the effect of petitioners' contention relating to the rights of the executor.

For the reasons above stated, it is ordered that a peremptory writ of prohibition issue herein prohibiting the respondent court from proceeding with the trial of the action in the present state of the record.

I concur: WARD, J.

PETERS, Presiding Justice, (dissenting).

I dissent.

In my opinion, the facts set forth in the petition herein do not warrant the issuance of the writ of prohibition. That writ is a jurisdictional writ, and will lie only where the court below has no jurisdiction or has exceeded its jurisdiction. County of Sutter v. Superior Court, 188 Cal. 292, 204 P. 849; Fitts v. Superior Court, 4 Cal.2d 514, 51 P.2d 66, 102 A.L.R. 290; Klement v. Superior Court, 21 Cal. App.2d 456, 69 P.2d 869. The majority opinion holds that when a plaintiff brings an action against the several legatees named in a will to establish a trust against the individual interest of each legatee, that all of the named legatees are not only proper parties but are indispensable parties, and that the trial court has no jurisdiction to proceed with the trial against one of the legatees unless all legatees are served and brought before the court.

The majority opinion holds that a peremptory writ of prohibition should issue herein prohibiting the respondent court from proceeding with the trial "in the present state of the record". It is implied that, if the plaintiff shall see fit to dismiss as against those legatees not served, the cause may proceed to trial against the residuary legatee alone. It is also implied that, if the complaint had named the residuary legatee as the sole defendant, the cause could properly have proceeded to trial against such legatee alone. These implications arise from the discussion of Rundell v. McDonald, 62 Cal.App. 721, 217 P. 1082, and Oles v. Wilson, 57 Colo. 246, 141 P. 489, appearing in the majority opinion. Apparently the theory of these cases is approved. If this be so, it demonstrates, in my opinion, the basic weakness in the decision of my associates. Those cases recognize that a trial court has jurisdiction to try an action by a plaintiff against one of several legatees where the plaintiff is seeking to have a trust declared against the defendant legatee on the ground that the testator entered into a contract to will the property to plaintiff. Those cases hold, and properly so, that the trial court has jurisdiction of such an action although all of the legatees are not named as parties defendant. Does this not conclusively demonstrate that the other legatees are not indispensable parties? I think it does. If the party is indispensable the cause may not proceed to trial without him. If all the legatees are not indispensable parties it can make no difference, so far as jurisdiction is concerned, whether all of the legatees are named as defendants but only one served, or whether but one is sued and served with process.

It seems quite clear to me that in such an action all of the legatees are *proper* parties, but they are not *indispensable* parties. The respondent court could have ordered all legatees to be brought before the court, but in the exercise of its discretion, refused to do so.

In Oles v. Wilson, 57 Colo. 246, 141 P. 489, under statutes substantially similar to those here involved, it was specifically held that a trust could be imposed against the interests of one group of legatees, and that other legatees interested in the estate were proper but not indispensable parties. The court stated (141 P. page 498): "While, no doubt, it would have been proper and, perhaps, wise to have joined, as defendants, all the legatees under the will, still the rights of the residuary legatees can be ascertained and settled in this suit without the presence of the others, and the case may proceed."

Rundell v. McDonald, 62 Cal.App. 721, 217 P. 1082, is also directly in point. In

that case suit was commenced against all of the heirs of an estate to impose a trust against their respective interests in the estate. Prior to trial, plaintiff dismissed as to certain of the heirs. Whether this dismissal was with or without prejudice does not appear. On appeal it was contended that the judgment should be reversed because all of the heirs of the deceased were not before the trial court, and that the court had no jurisdiction to proceed without their presence. The court recognized that, if the other heirs were indispensable parties, within the meaning of section 389 of the Code of Civil Procedure, the contention of appellant was sound. It was held that the other heirs were not indispensable parties and that appellant could not complain that they were not before the court. At page 728 of 62 Cal.App., at page 1085 of 217 P., it is stated: "If, on the other hand, as appellant contends, an action such as this can be maintained only against the heirs, appellant nevertheless is in no position to complain of any defect of parties defendant, since the decree cannot injudiciously affect the other heirs. Though the heirs succeeded to the legal title as tenants in common, they held their respective undivided moieties by several and distinct titles. The principle upon which courts of equity undertake to enforce the execution of an agreement to dispose of property in a particular way by last will and testament is one which is referable to the subject of specific performance. But a court has no power to compel a person to execute a last will and testament carrying out an agreement to bequeath or devise his property, for this can be done only in the lifetime of the testator. No breach of the agreement can be assumed so long as he lives, and after his death he no longer is capable of doing the thing agreed to be done by him. The theory on which the courts proceed, therefore, is to fasten a trust on the property in favor of the promisee, and to enforce such trust against the heirs of the deceased. *Under this theory each heir holds the title to which he has succeeded in trust for the promisee.* In the instant case the effect of the judgment against appellant as the surviving husband was to fasten a trust on the title to which he succeeded and to compel a conveyance of that title to respondent. If, as appellant contends, an action such as this lies only against the heirs of the deceased promisor and not against his estate or personal representative, then the judgment cannot be pleaded against any of the heirs as to whom the action was dismissed. It follows, therefore, that the decree in no wise affects the rights of appellant's coheirs, *and that they were not indispensable parties to the action.*" (Italics ours.)

These cases are directly in point. They demonstrate that the other legatees or heirs, although proper parties, are not indispensable parties in the type of action here involved. The jurisdictional writ of prohibition will be granted to restrain trial only where indispensable parties have not been brought before the court. Where a judgment may be entered without prejudicing the rights of parties not before the court their absence does not go to the jurisdiction of the court, and prohibition will not be granted. Morrow v. Superior Court, 9 Cal.App.2d 16, 48 P.2d 188, 50 P. 2d 66; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445.

The reasoning upon which the Rundell and Oles cases are predicated is sound. Where there has been a breach of a valid contract to make a will, the remedy of the promisee is by suit in equity against those who take the estate. Administration proceeds under the will, but the interests of the devisees and legatees who are sued are subject to a trust in favor of the promisee under the agreement with decedent. The probate of the estate is not interfered with. Estate of Rolls, 193 Cal. 594, 226 P. 608; Estate of Berry, 195 Cal. 354, 233 P. 330; 26 Cal.Jur. p. 834, sec. 163. The action is a personal action against each legatee. A decision against any one legatee in no way affects the rights or interests of the other legatees. The majority opinion seeks to avoid the application of this reasoning, which it impliedly concedes is sound, by pointing out that in the present case the prayer of the complaint requests that the alleged agreement with the decedent be established, that it be decreed that the plaintiff is the owner of the entire estate, and that her title thereto be quieted. This prayer is obviously predicated upon the fact that all legatees are joined in the complaint. The action is a personal action against the legatees. No judgment could be entered against any defendant not served. Rundell v. McDonald, supra. We cannot presume the trial court will commit error. The action is in personam and not in rem. Under such

circumstances, the prayer of the complaint cannot operate to change the rule above discussed.

The numerous cases cited by petitioners are not in conflict with the above reasoning. Many of them emphasize the propriety of bringing in all the parties necessary to a full determination of the entire controversy to prevent future litigation and multiplicity of suits. But here the trial court, in the exercise of its discretion, has determined that justice will not be served by requiring all the legatees to be served in this action. Under the cases already cited, if it is possible to enter a judgment which will not injuriously affect the missing parties, or where the absence of such parties will not injuriously affect the parties before the court, such absence does not go to the jurisdiction of the court and cannot be controlled by the jurisdictional writ of prohibition.

The difficulties envisaged in the majority opinion are more imaginary than real. If the action proceeds against the residuary legatee alone, and the plaintiff prevails, the plaintiff will be entitled to distribution of the share of the residuary legatee—the balance will be distributed to the other legatees named in the will. Such a judgment will not, and cannot, injuriously affect the other legatees, nor will the absence of the other legatees injuriously affect the residuary legatee. The mere fact that there may be a multiplicity of suits does not go to the jurisdiction of the trial court to try severable causes of actions separately.

It also is clear that the other petitioner—the executor of the estate—will not be adversely affected by any judgment or judgments that may be rendered against the legatees. It is quite clear that the executor is not a party beneficially interested in the action now pending in the respondent court. The California cases hold, without exception, that the executor or administrator has no legal interest in a will contest or in an action to enforce a contract to make a will. The cases establish that the executor or administrator is a mere stakeholder whose duty it is to conserve the assets of the estate and to turn them over to the parties designated by the court; that the executor or administrator has no legal interest in a controversy between claimants of the estate; that he cannot appeal from any judgment affecting the division of the estate between claimants thereto; that he is not entitled to receive fees for extraordinary services in any action concerning the rights of the claimants to the estate; that, although he is a proper party in a will contest or in an action to enforce a contract to make a will, he is not an indispensable party; that he is made a party for the sole reason that in this fashion he will be given notice of the pending action so that he will not distribute the estate while the action is pending. Estate of Murphey, 7 Cal.2d 712, 62 P.2d 374; Estate of Morgan, 203 Cal. 569, 265 P. 241; Estate of Babb, 200 Cal. 252, 252 P. 1039; Estate of Ross, 179 Cal. 358, 182 P. 303; Estate of Friedman, 176 Cal. 226, 168 P. 21; Estate of Ayers, 175 Cal. 187, 165 P. 528; McCabe v. Healy, 138 Cal. 81, 70 P. 1008.

Under these cases the executor has no legal interest in the action pending in the trial court, and is, therefore, not entitled to prohibition. The other petitioner, the residuary legatee, as already pointed out, cannot be adversely affected by the failure to serve the other legatees. The other legatees are not indispensable parties. For these reasons the writ should not issue.




40 Cal.App.2d Supp. 815

**HANSON et ux. v. MEAD-HASKELL CO. et al.**

No. 98548.

Appellate Department, Superior Court, San Diego County, California.

March 29, 1940.

As Modified on Denial of Rehearing.

April 16, 1940.

1. Courts ⇐169(1)

An action to recover $2,000 placed in escrow for plaintiffs by defendant, after failure of escrow, was an "action for money had and received," with equitable principles only incidentally involved and hence municipal court had jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Action for Money Had and Received".

**2. Bankruptcy ⇐140(3)**

There was no debtor-creditor relationship between corporation and persons for whom it acted as agent in placing their money in escrow, and corporation acquired no interest therein which would descend to its bankruptcy trustee, so that such persons were entitled to return of money after escrow failed.

**3. Bankruptcy ⇐140(3)**

The rights of judgment creditor and bankruptcy trustee of corporation, placing money delivered to it by owners thereof in escrow with bank, are not superior to such owners' claim against such money after failure of escrow.

**4. Property ⇐7**

Possession of money vests title thereto in holder as to third persons dealing with him and receiving it from him in due course of business and in good faith on valid consideration.

**5. Bankruptcy ⇐140(3)**

A corporation, to which money was delivered by owners thereof to be placed in escrow with bank, was not equitable owner thereof, parted with all indicia of title thereto by transmitting money to such bank, acquired no right, title, or interest therein because of withdrawal from escrow by other party thereto, and did not become entitled to return money on going into bankruptcy.

---

Appeal from Municipal Court of San Diego; Joe L. Shell, Judge.

Action by Fred Hanson and wife against the Mead-Haskell Company, a corporation, Eugene Scharr, its trustee in bankruptcy, and another, to recover money placed in escrow for plaintiffs by the bankrupt. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Glen H. Munkelt, of San Diego, for appellants.

B. F. Tyler, of San Diego, for respondents.

MUNDO, Judge.

In April, 1939, plaintiffs delivered to Mead-Haskell Co. $2,000 to be placed in escrow with the Union Title Insurance & Trust Company and to be paid out to Mrs. Ethel B. Fletcher in consideration for a note and trust deed upon real property owned by her. Mrs. Fletcher cancelled her portion of the escrow, leaving the $2,000 with the title company. A judgment creditor of Mead-Haskell Co. levied on the $2,000 under the assumption it was Mead-Haskell's property.

The evidence shows that Mead-Haskell Co. received plaintiffs' money, deposited it to its own general account in the bank, disbursed it, and upon replenishing its bank account delivered $2,000 to the title company for the Hanson-Fletcher escrow. A petition in bankruptcy was filed May 19, 1939, and Mead-Haskell Co. was adjudicated a bankrupt on July 19, 1939. The trustee in bankruptcy, being subrogated to Mead-Haskell's rights in the premises, claims an interest in the money held by the title company. The plaintiffs had no knowledge of Mead-Haskell's insolvency when the money was delivered to Mead-Haskell. At the time Mead-Haskell delivered the $2,000 to the title company for the escrow its account at the bank was not entirely depleted. The trial court found for the plaintiffs and its judgment was that the $2,000 is the property of the plaintiffs and that neither Mead-Haskell Co. nor the trustee in bankruptcy have any right, title or interest in and to the said sum. The trustee in bankruptcy appeals, contending principally that (1) the Municipal Court did not have jurisdiction of the subject matter of the action; (2) quiet title action not the proper remedy, and (3) relationship between plaintiffs and Mead-Haskell was that of creditor-debtor. These contentions will be dealt with in order.

[1] Whatever the action may be denominated we are of the opinion that it is an action at law for money had and received, and that equitable principles are only incidentally involved.

"An action for money had and received, though technically an action at law, proceeds upon equitable principles." Hayward Lumber, etc., Co. v. Lyders, 139 Cal.App. 517, 530, 34 P.2d 805, 811.

See also Hooper v. Miley Oil Co., 109 Cal.App.Supp. 767, 288 P. 26, where the Municipal Court was held to be justified in entertaining an action at law which incidentally involved equitable relief.

[2-4] At no time was there a true debtor-creditor relationship between Mead-Haskell Co. and the plaintiffs; nor did Mead-Haskell Co. acquire any interest in and to the money which would descend to

the trustee in bankruptcy. Plaintiffs delivered the money to Mead-Haskell Co. to be placed in escrow; Mead-Haskell Co. acted as the agent of plaintiffs in delivering the money to the escrow at the title company. Plaintiffs' title to the $2,000 would not pass to Mrs. Fletcher until the conditions of the escrow were performed. The escrow failing, plaintiffs were entitled to a return of the money. The transmission of the $2,000 from plaintiffs through Mead-Haskell Co. to an escrow in the Union Title Company would not give any creditor a greater percentage of his debts than other creditors. The transaction preferred no creditors, was not fraudulent, and the transferee was not a bona fide holder for value. Mead-Haskell Co. received $2,000 and transmitted $2,000, so that the Mead-Haskell estate was not decreased by the transaction and no creditor's portion was in any way decreased. It is as though Mead-Haskell made change for the plaintiffs—no profit to Mead-Haskell, no loss. The case does not involve the law of trusts; the tracing of specific money is not involved at all. There was no evidence of fraud by Mead-Haskell in the use of funds credited to its bank account, nor was there any evidence that plaintiffs knew how or in what manner Mead-Haskell Co. proceeded to deposit the money with the Union Title Company. The rights of third parties herein involved are not superior to plaintiffs' claim against the money deposited by Mead-Haskell Co. with the Union Title Company. "It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of an accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience and to give security and certainty to business transactions, adjudges that the possession of money vests title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration." Stephens v. Board of Education of City of Brooklyn, 79 N.Y. 183, 187, 35 Am.Rep. 511.

[5] The trial court found that Mead-Haskell Co. never was the equitable owner of the $2,000; that if it had any interest at all in the money it parted with all indicia of title when it transmitted the amount to the title company; that the title company thereafter held same for the benefit and purposes of plaintiffs; that Mead-Haskell Co. had no right, title or interest in said $2,000 while it was in escrow and acquired no right, title or interest in said sum by reason of the withdrawal of Ethel B. Fletcher from the escrow; that no right to the return of this money to Mead-Haskell Co. was created by its going into bankruptcy and that no title to said $2,000 passed to Mead-Haskell's trustee in bankruptcy. These findings we believe to be correct. The judgment therefore is affirmed.

HAINES, P. J., and TURRENTINE, J., concur.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8971

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

